SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 118

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

BROWN SHOE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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BEFORE FEDERAL TRADE COMMISSION

Docket No. 7606

In the Matter of Brown Shoe Company, a Corporation

Complaint—Issued by the Federal Trade Commission on October 13, 1959

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described has violated the provisions of Section 5 of said Act (U. S. C., Title 15, Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating its charges as follows:

Count I

Paragraph One: Respondent, Brown Shoe Company, sometimes hereinafter referred to as "Brown", is a corporation organized under the laws of the State of New York with its office and principal place of business located at 8300 Maryland Avenue, St. Louis, Missouri.

Paragraph Two: Brown is an integrated company operating at all levels of the shoe industry. Prior to 1950, it was primarily engaged in the manufacture and distribution of shoes at the wholesale level. Since 1951, through the acquisition of retail shoe stores Brown has become a substantial and large retailer of shoes. Brown owns and operates 48 factories and warehouses in 41 different cities located in seven states. Brown's total sales of $236,946,078 for its fiscal year ending October 31, 1957, make it the world's second largest manufacturer and seller of shoes.

Brown's shoes are marketed by three separate methods or plans: (1) through independent retail shoe stores which have entered a franchise agreement with Brown or one of [fol. 4] its divisions or subsidiaries; (2) through wholesale sales to independent shoe stores, chains and mail order

houses; and (3) through approximately one thousand company-owned retail stores.

Brown's shoes are sold under a wide variety of trade names. The Kinney and Regal brands are sold only through Brown owned retail stores bearing those names. Brown shoes for men are trade named Educator, Pedwin, Roblee, Stuart Holmes, and Style-Craft. Brown shoes for women are marketed under the trade names Air Step, Connie, Educator, Glamour Debs, Jacqueline, Life Stride, Marquise, Naturalizer, Natural Poise, Paris Fashion, Revette, and Risque. The Brown manufactured children's shoes bear the names Buster Brown, Educator, Official Boy Scout, Official Girl Scout, Propr-bilt, and Robin Hood. All of the Brown shoes retail in the medium price field. In addition, shoes are sold to retail chain and mail order houses for resale under the private brand names of the customers.

Paragraph Three: The shoes manufactured or distributed by Brown have been, and are being, sold by Brown through its divisions and subsidiaries to purchasers located throughout the several States of the United States, the territories thereof, and in the District of Columbia. The respondent causes said shoes to be transported and shipped from the various places of manufacture to purchasers thereof who are located in states other than the state where said shoes were manufactured, and there has been and is now a constant and continuous current and flow of said shoes in interstate commerce. Respondent, therefore, is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Paragraph Four: Except to the extent that competition has been hindered, frustrated, and lessened as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the manufacture, sale and distribution of shoes in "commerce" as that term is defined in the Federal Trade Commission Act.

Paragraph Five: In the course and conduct of its business in commerce, Brown, through its Brown Franchise Stores division, has been and is now engaged in unfair [fol. 5] methods of competition and unfair acts or practices in that it has entered into contracts or franchises with a substantial number of its independent retail shoe store

operator customers which require said customers to restrict their purchases of shoes for resale to the Brown lines and which prohibit them from purchasing, stocking or reselling shoes manufactured by competitors of Brown. Customers who have entered into such agreements or franchises with Brown are termed "Brown Franchise Stores", and are afforded special treatment and given certain benefits, hereinafter described, which are not granted to the Brown customers who do not enter into such agreements or franchises.

Paragraph Six: At the present time, there are approximately 650 Brown Franchise Stores located in forty-seven of the states of the United States. Total sales by Brown to the Brown Franchise Stores in Brown's fiscal year ending October 31, 1957, were $21,724,564.00.

Brown Franchise Stores are, for the most part, "family type" stores selling a complete line of shoes to fit every member of the family. They are mostly located in the towns and smaller cities and only one Franchise Store is appointed in each town or small city.

Paragraph Seven: Among the valuable benefits or services received by Brown Franchise Stores from, or through, Brown are free signs, business forms and accounting assistance participation in lower cost group fire, public liability, robbery, and life insurance policies; and special, below list prices on U. S. Rubber Company canvas and waterproof footwear.

As consideration for the above-enumerated services, the Brown Franchise Store is required to concentrate its purchasing to the grades and price lines of shoes sold by Brown and to refrain from stocking and selling the shoes of competitors of Brown. The Standard Brown Franchise agreement provides that the franchisees will:

> "1. Concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company."

[fol. 6] Paragraph Eight: Dealers who violate the above-described agreement, by buying and stocking shoes manufactured and sold by competitors of Brown, are dropped

from the Franchise program and are deprived of the hereinbefore-described valuable benefits attendant thereto. Acting on instruction from Brown, the insurance companies which write the Brown-sponsored, term group fire, public liability, robbery and life insurance policies covering Brown Franchise Stores, refuse to renew the policies of recalcitrant dealers. Also acting on instructions from Brown, the United States Rubber Company charges recalcitrant dealers higher prices for canvas and waterproof footwear. Furthermore, Brown itself withdraws and refuses to grant to dealers dropped from the Franchise program, the free signs, business forms, accounting assistance and other services and benefits granted to dealers under the Franchise program.

Paragraph Nine: The purpose, intent or effect of the aforesaid methods, acts and practices of the respondent has been, is, or may be, substantially to lessen, hinder, restrain and suppress competition in the purchase and sale of shoes in interstate commerce; to cause a substantial number of retail shoe dealers to refrain from, or discontinue, buying and handling shoes of competitors of Brown; to exclude, or to tend to exclude, competitors of Brown from selling shoes to a substantial number of retail shoe dealers; to foreclose competitors of Brown from a substantial share of the retail dealer market in many trade areas; to appropriate to Brown the exclusive right to supply substantially the entire purchased shoe requirements of a substantial number of retail shoe dealers; and to enhance further the dominant position of Brown in the shoe industry and thereby to tend to create a monopoly in Brown in the purchase and sale of shoes in interstate commerce.

Count II

Paragraph Ten: Paragraphs One through Four of Count I are hereby incorporated by reference and made a part of this charge as fully and with the same effect as though here again set forth verbatim.

Paragraph Eleven: Through its sales divisions and subsidiaries, Brown sells its branded shoes to more than [fol. 7] fifteen thousand independent retail shoe stores located in each of the states of the United States and in the District of Columbia.

In many trade areas throughout the country, the independent retail shoe store customers of Brown compete with each other or with Brown owned retail stores in the resale to the public of Brown manufactured shoes.

Paragraph Twelve: In the course and conduct of its business of selling branded shoes to independent retail shoe stores, Brown has been, and is now, engaged in unfair methods of competition and unfair acts or practices in commerce, in that it forces and requires or attempts to force and require its retail shoe store operator customers to agree to maintain arbitrary, non-competitive resale consumer prices fixed and promulgated by Brown.

Paragraph Thirteen: Brown regularly publishes and distributes to its retail shoe store operator customers price lists or catalog sheets which contain the consumer prices to be observed by said customers.

Frequently Brown publishes said consumer prices in full page advertisements in magazines having national circulation.

Through its representatives and officials, Brown maintains continuous pressure upon its retail shoe store operator customers to insure that they do not depart from or sell below the minimum resale prices fixed by Brown. Customers who do advertise or sell at prices below the agreed minimum are immediately contacted by a Brown representative, who is instructed to secure the operator's adherence to the fixed minimum prices by persuasion, but if that fails, to threaten and inform the customer that Brown will discontinue doing business with it.

Paragraph Fourteen: By means of the aforesaid unlawful agreements, which respondent enforces or attempts to enforce by coercion and threats, plus the distribution of the aforesaid price lists and the publication of prices in national magazines, Brown has illegally fixed, controlled and maintained, or attempted to fix, control and maintain, the prices at which shoes manufactured and distributed by it are resold to consumers.

[fol. 8] Paragraph Fifteen: The acts and practices of Brown as alleged in Counts I and II of this complaint are all to the prejudice of competitors of Brown and to the public; have a tendency to hinder and prevent, and have actually hindered and prevented, competition in the pur-

chase and sale of shoes in commerce; have a tendency to obstruct and restrain, and have actually obstructed and restrained such commerce in shoes; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Wherefore, the Premises Considered, the Federal Trade Commission, on this 13th day of October, A. D., 1959, issues its complaint against said respondent.

NOTICE

Notice is hereby given to the respondent hereinbefore named that the 15th day of December, A. D., 1959, at 10 o'clock is hereby fixed as the time and St. Louis, Missouri, as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

If respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be [fol. 9] issued by the hearing examiner. In such answer respondent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided, and failure to appear at the time and place fixed for hearing, shall be deemed to authorize a hearing examiner, without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed at Washington, D. C., this 13th day of October, A. D. 1959.

By the Commission.

Robert M. Parrish, Secretary.

(Seal)

Before The Federal Trade Commission

Answer of Respondent Brown Shoe Company, Inc.—
Filed November 20, 1959.

Comes now the Respondent, Brown Shoe Company, Inc. (designated in the Complaint as Brown Shoe Company), by its undersigned attorneys, and, reserving specifically all objections it may have to the jurisdiction of the Federal Trade Commission over the subject matter of the Complaint, states as follows:

Answering the first unnumbered paragraph of the Complaint, it Denies that the Federal Trade Commission has reason to believe that the Respondent has violated the provisions of Section 5 of the Federal Trade Commission [fol. 10] Act (U. S. C., Title 15, Section 45), and Denies that a proceeding by it in respect thereof would be in the public interest.

Answer to Count I

One: It Admits the allegations in Paragraph One of Count I of the Complaint, except that it States that its corporate name is Brown Shoe Company, Inc., and that its office and principal place of business is in St. Louis County, Missouri.

Two: It Denies each and every allegation in the first subparagraph of Paragraph Two of Count I of the Complaint contained, except that it Admits that prior to 1950 it was primarily engaged in the manufacture and distribution of shoes at the wholesale level, and States that since 1950 it has been and now is primarily engaged in the manufacture and distribution of shoes at the wholesale level; that it has not been and is not now engaged in the retailing of shoes, although certain of its wholly owned subsidiary corporations are retailers of shoes; that it owns and operates thirty-four (34) factories and four (4) warehouses and supply plants in thirty-five (35) different cities located in six (6) States; its wholly owned subsidiary corporations owning and operating five (5) factories and three (3) warehouses; and that the total sales figure of $236,946,078 for the fiscal year ended October 31, 1957, as set forth in the Complaint, is, in fact, a consolidated figure representing total sales of Brown and all of its subsidiary corporations, both at wholesale and at retail, not only of shoes but also of other articles, for the said fiscal year.

It Denies each and every allegation in the second subparagraph of Paragraph Two contained, except that it Admits that its shoes are marketed (1) by sales at wholesale to independent retail shoe stores, the owners of which have entered into a franchise agreement with it, or which are operating on the so-called "Brown Franchise Program" without the execution of a franchise agreement; (2) by sales at wholesale to independent shoe stores, chains and mail order houses, and States that, in addition, its shoes are marketed by sales at wholesale to other types of customers.

[fol. 11] It Denies each and every allegation in the third subparagraph of Paragraph Two contained, except that it Admits that certain of the men's shoes manufactured by it and marketed under its brand or trade names are marketed under the brand or trade names "Pedwin"

and "Roblee"; that certain of the women's shoes manufactured by it and marketed under its brand or trade names are marketed under the brand or trade names "Air Step", "Life Stride", "Naturalizer" and "Risque"; that certain of the children's shoes manufactured by it and marketed under its brand or trade names are marketed under the brand or trade names of "Buster Brown", "Robin Hood" and "Propr-Bilt"; that certain of the boys' shoes manufactured by it and marketed under its brand or trade names are marketed under the brand or trade name of "Buster Brown"; that certain of the girls' shoes manufactured by it and marketed under its brand or trade names are marketed under the brand or trade names of "Glamor Debs", "Robinettes" and "Robin Hood"; that it has a non-exclusive license to manufacture and sell, and does manufacture and sell, children's, boys' and men's shoes bearing the name "Official Boy Scout" and girls' shoes bearing the name "Official Girl Scout"; that all of the shoes so manufactured and marketed by Brown under said brand or trade names retail in the medium price field, and that it also manufactures shoes which are sold to certain retail stores, chain stores, mail order houses and wholesalers for resale under the private brand names of such customers.

Three: It Admits the allegations in Paragraph Three of Count I of the Complaint, except that it Denies that it causes any shoes manufactured or sold by its subsidiaries to be transported and shipped as therein alleged.

Four: It Admits the allegations in Paragraph Four of Count I of the Complaint, except that it Denies that competition has been hindered, frustrated and lessened, as set forth in the Complaint, and that it is engaged in the distribution of shoes at retail.

Five: It Denies each and every allegation in Paragraph Five of Count I contained, except that it Admits it has entered into contracts or franchises with approximately two [fol. 12] hundred fifty-nine (259) of its independent retail store operator customers, which stores are termed "Brown Franchise Stores", a copy of which contract or franchise, identified as Exhibit "A", is attached hereto and made a part hereof, to which reference is hereby made for information with respect to the rights, privileges and obligations of the parties thereto; and that approximately four hundred

twenty-three (423) of its independent retail shoe store operator customers are operating stores termed "Brown Franchise Stores" on the so-called "Brown Franchise Program", but have signed no such contract, and States that such independent retail shoe store operator customers operating such Brown Franchise Stores in individually varying degrees accept the different rights and privileges and perform the different obligations set forth in such contracts or franchises or implicit in such Program.

Six: It Admits each and every allegation in Paragraph Six of Count I of the Complaint contained, except that it States that there are approximately six hundred eighty-two (682) Brown Franchise Stores, that the line of shoes sold by such stores is only approximately "complete", that such stores are mostly located in towns or cities with populations of from 5,000 to 30,000, and that there are some instances in which more than one franchise store has been located in such communities.

Seven: It Denies each and every allegation in Paragraph Seven of Count I of the Complaint contained, except that it refers to Exhibit "A" hereto for an accurate description of the services which the owners of Brown Franchise Stores are entitled to receive from or through it; it Admits that the said Agreement contains the provision quoted in the second subparagraph of said Paragraph Seven of the Complaint; and it States that the operators of such Brown Franchise Stores in individually varying degrees accept the benefits and perform the obligations contained in such franchise agreements or implicit in such Program.

Eight: It Admits that it refuses to grant to dealers who are dropped or voluntarily withdraw from the Brown Franchise Program additional merchandising records, the [fol. 13] services of a field representative, and the right to participate in group insurance purchasing, national and regional meetings, and group purchasing (of rubber footwear), as in said Exhibit "A" provided, and that, having been advised by it that the operator of a Brown Franchise Store has voluntarily withdrawn or been dropped from the Program, the insurance companies which write the group fire, public liability, robbery, safe burglary, business interruption and life insurance policies covering the owners of Brown Franchise Stores refuse to renew the policies of

such dealer; States that it is without knowledge as to whether or not the United States Rubber Company charges dealers who voluntarily withdraw or are dropped from the franchise program higher prices for canvas or waterproof footwear, and hence Denies the allegation with respect thereto, and Denies each and every other allegation in Paragraph Eight of Count I of the Complaint contained.

Nine: It Denies each and every allegation, conclusion and assumption in Paragraph Nine of said Count I of the Complaint contained.

It Denies each and every allegation and conclusion in Paragraph Fifteen of the Complaint contained.

Wherefore, Respondent respectfully prays that Count I of the Complaint be dismissed.

Answer to Count II

Ten: For answer to Paragraph Ten of Count II of the Complaint, it repeats the admissions, denials and allegations contained in Paragraphs One through Four of its foregoing Answer to Count I of said Complaint, and incorporates the same by reference in this Answer to Count II as if set forth herein in haec verba.

Eleven: It Admits that through its sales divisions it sells its branded shoes to approximately 6,000 independent retail shoe customers located in each of the States of the United States and in the District of Columbia, and that some of such independent retail shoe customers may compete with each other in the resale to the public of shoes manufactured and so sold by it, but Denies each and every [fol. 14] other allegation in Paragraph Eleven of Count II of the Complaint contained.

Twelve: It Denies each and every allegation in Paragraph Twelve of Count II of the Complaint contained.

Thirteen: It Admits that it regularly distributes to its retail shoe customers price lists or catalog sheets, certain of which contain suggested retail selling prices; that on occasions it publishes suggested retail selling prices in full page advertisements in magazines having national circulation, but Denies each and every other allegation in Paragraph Thirteen of Count II of the Complaint contained.

Fourteen: It Denies each and every allegation in Paragraph Fourteen of Count II of the Complaint contained.

Fifteen: It Denies each and every allegation and conclusion in Paragraph Fifteen of the Complaint contained.

Wherefore, Respondent respectfully prays that Count II of the Complaint be dismissed.

Brown Shoe Company, Inc., By /s/ R. H. McRoberts, /s/ Gaylord C. Burke, /s/ Edwin S. Taylor, Its Attorneys, 1630 Boatmen's Bank Building, St. Louis 2, Missouri.

Bryan, Cave, McPheeters & McRoberts, Of Counsel.

Exhibit A to Answer

Franchise Agreement

BFS

I desire to affiliate my business with the Brown Franchise Stores' Program. Upon acceptance, as indicated by your signature affixed hereto, I will expect the company to provide the following:

[fol. 15] A Franchise for my retail shoe business for the following nationally advertised Brown Division Brands of Brown Shoe Company:

....
....
....
....

In addition, any or all of the following services which my business may require:

A. Architectural Plans.

An efficient and attractive arrangement and design drawn expressly for the location, complete with specifications as prepared by your Store Planning Department.

B. Service of a Field Representative.

The Brown Franchise Stores Division's Field Representative will call on my store and advise on merchandising, sales promotion, personnel, accounting, record systems and other matters pertinent to a profitable shoe business.

C. Merchandising Records.

This includes: a Kardex-type Merchandise Record System (a charge for binders only); a Perpetual Size Sheet System for men's, women's and children's shoes; and an Open-To-Buy and Sales Plan System.

D. Retail Sales Training Program.

This program will be conducted by the Field Representative in the store.

E. Accounting System.

The system divised by Brown Shoe Company for a retail shoe business which gives complete information concerning the status of my business at all times.

F. Group Insurance Purchasing.

Participation in Fire, Public Liability, Robbery, Safe Burglary, Business Interruption and Life Insurance Group Insurance Policies.

[fol. 16] G. National and Regional Meetings.

Provided for the exchange of information on operation techniques and current economic conditions related to the retail shoe business.

H. Group Purchasing.

Participation in purchasing of rubber footwear and display material.

In return I will:

1. Concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have

no lines conflicting with Brown Division Brands of the Brown Shoe Company.

2. Operate a modern, attractive store at all times, staffed by efficient personnel and backed by adequate capital. Provide for local advertising budget based on the minimum of 3% of my annual anticipated sales and will promote and merchandise aggressively to secure maximum volume.

3. Carry full insurance on the stock and fixtures, preferably through Brown Shoe Company. If insurance is purchased locally, Brown Shoe Company will be notified.

4. Maintain and use Merchandise Record System.

5. Use and keep current the complete accounting and bookkeeping system as provided by Brown Shoe Company, make regular Monthly Reports and permit records to be audited at the discretion of Brown Shoe Company. Copies of Monthly Reports will be sent to the Field Representative and the Brown Franchise Stores Division in St. Louis for the information, analysis and suggestions.

6. Not encumber the stock or fixtures by chattel mortgage or otherwise, nor enter into any lease without previously advising the Franchise Stores Division of Brown Shoe Company.

7. Upon termination of this Agreement for any reason, not thereafter use or have the right to use any [fols. 17-18] Brown Franchise Store identification or the trade marks or trade names of those Franchise lines which were revoked upon such termination. In addition, the Franchise Stores Accounting and Merchandising Systems and forms, as well as all other supplies and services mentioned above, will no longer be supplied.

I further understand that this relationship may be cancelled by either party upon its giving 30 days written notice to that effect to the other party.

.... (Date)	.... (Name of Firm or Corporation)
Field Representative:	Doing Business as:
....	.... (Store Name)
Approved: Brown Shoe Company	.... (Street Address)
By:	.... (City and State)
	.... (Signature of Member of Firm or Corp.)

[fol. 19] BEFORE THE FEDERAL TRADE COMMISSION

INITIAL DECISION—January 22, 1962

Edward Creel, Hearing Examiner.

James P. Timony, Counsel Supporting the Complaint.

Bryan, Cave, McPheeters & McRoberts, St. Louis, Missouri, by R. H. McRoberts, Gaylord C. Burke and Edwin S. Taylor, for the Respondent.

The Federal Trade Commission issued its complaint against the respondent on October 13, 1959, charging that it has entered into contracts or franchises with a substantial number of its independent retail shoe store operator customers which require these customers to restrict their purchases of shoes for resale to the respondent's lines and which prohibit them from purchasing, stocking or reselling shoes manufactured by competitors of respondent; and in a separate count, charging that it forces and requires, or at-

tempts to force and require, its retail shoe store operator customers to agree to maintain arbitrary, non-competitive resale consumer prices fixed and promulgated by respondent. The complaint charged that these practices, alleged in [fol. 20] both counts of the complaint, constituted unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act. Respondent's answer denied generally the allegations of the complaint, although minor factual allegations were admitted.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint and oral argument thereon. At the close of the presentation of the Commission's case, respondent moved for dismissal of the charges on the grounds that a prima facie case had not been established. The hearing examiner elected to defer ruling upon this motion until the close of all the evidence in the case. The hearing examiner now hereby denies the motion to dismiss the complaint. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings as to the facts, conclusions drawn therefrom, and issues the following order:

Findings as to the Facts

Count I

1. Brown Shoe Company, Inc., (referred to in the complaint as Brown Shoe Company; hereinafter sometimes referred to as "respondent" and as "Brown") is a New York corporation with its office and principal place of business at 8300 Maryland Avenue, St. Louis County, Missouri.

2. Respondent has among its wholly owned subsidiaries G. R. Kinney Corp., Regal Shoe Company, Wohl Shoe

Company, Bourbeuse Shoe Company, and Moench Tanning Company, Inc.

Respondent is primarily engaged in the manufacture and distribution of a broad line of medium-priced, nationally advertised shoes for men, women, and children. These shoes [fol. 21] are marketed principally by sales at wholesale to independent retail shoe store customers. In 1959, respondent was actively selling to approximately 6,000 independent retail shoe stores.

Respondent and its subsidiaries have over fifty manufacturing plants, tanneries and warehouses in ten states of the United States and in Canada.

3. Wohl Shoe Company (hereinafter referred to as "Wohl") is a wholly owned subsidiary of respondent, and is a Missouri corporation with its principal office at 1601 Washington Avenue, St. Louis, Missouri. Wohl sells shoes at wholesale to independent retail customers and also at retail to consumers.

Wohl sells women's shoes at wholesale to approximately 3,200 customers located throughout the United States and the District of Columbia. In 1958 there were 208 of these customers operating on the "Wohl Plan". A Wohl plan account is an independent retail outlet which is partially financed by Wohl and generally buys most of its women's shoes from Wohl. In addition, Wohl retails primarily womens' shoes, but also some children's and men's shoes. In 1958 Wohl was selling at retail through 457 leased departments in 243 stores.

Regal Shoe Company, a wholly owned subsidiary of respondent, is a manufacturer and retailer of men's medium-priced shoes. In 1958 Regal had a chain of 92 retail outlets in which its shoes were sold.

The G. R. Kinney Corporation is a wholly owned subsidiary of respondent. It operates a chain of family shoe stores and manufactures and sells men's, women's, and children's popular-priced shoes. In 1959 it owned and operated 488 retail stores.

4. Respondent has separate selling divisions through which it markets its brands of shoes. The principal brands and the divisions selling them are:

[fol. 22] Division	Brand
Air Step	Air Step
Buster Brown	Buster Brown
	Glamour Debs
	Official Boy Scout
	Official Girl Scout
	Propr-Bilt
Life Stride	Life Stride
Naturalizer	Naturalizer
Risque	Risque
Robin Hood	Robin Hood
	Robinettes
Roblee	Roblee
United Men's	Buster Brown
	Official Boy Scout
	Pedwin

Each of these sales divisions has its own sales manager and its own sales force. A retailer who sells respondent's shoes will be called on by a salesman from each division whose brand he carries. Each of the sales managers of the sales divisions is responsible to the vice-president in charge of sales.

5. In 1957, Brown conducted the largest consumer advertising campaign in the shoe industry, spearheaded by 52 color pages in Life Magazine and 58 additional pages in other leading national magazines.

6. Respondent's sales for the fiscal year ending October 31, 1959, including the sales of its subsidiaries at wholesale and at retail, were $276,549,164. Respondent is second in dollar sales and third in pairage production among shoe manufacturers in the United States.

7. Respondent has been, and is now, in competition with other corporations, individuals, and partnerships engaged in the manufacture, sale, and distribution of shoes in interstate commerce.

8. Respondent manufactures shoes in six states of the United States. Respondent causes its shoes to be transported and shipped from these places of manufacture to retail [fol. 23] shoe customers who are located in each of the states of the United States and the District of Columbia.

There has been, and is now, a constant and continuous current and flow of said shoes in interstate commerce.

9. Another division of respondent is the Brown Franchise Stores Division. The personnel of this division includes the headquarters staff comprised of three men, one of whom is the manager of the division, and sixteen salaried fieldmen who visit the franchise stores. The franchise stores division is responsible to the vice-president in charge of sales.

10. During a recent five year period, 200 stores entered the program. In November 1959, there were 682 stores on the program, and in October 1961, the total had risen to 766.

11. Of the retailers operating on the franchise program, about 259 have entered into written Franchise Agreements with respondent. In recent years written agreements have not been made with newcomers to the program. There is no difference in respondent's policy toward those franchise holders who have signed the agreement and those who have not, and the rights and obligations of both groups are the same. The total sales of respondent to retail stores on the franchise program for the fiscal year ending October 31, 1959, was $24,675,617.

12. For the benefits and services which dealers on the franchise program who entered into written agreements will receive, they agreed that:

> "In return I will:
>
> 1. Concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company."

This provision has been in effect since 1949 or 1950. The preceding Brown Franchise Contract provided that the Franchise Agreement terminated if the franchise dealer purchased shoes from any manufacturer other than Brown.

[fol. 24] 13. Among the benefits and services which a dealer will receive by being on the franchise plan are: architectural plans, service of a field representative, merchandising records, retail sales training program, account-

ing system, national and regional meetings, and group purchasing of insurance, rubber footwear, and display material.

14. The retailer on the franchise program obtains the service and assistance of field representatives who give advice and suggestions on merchandising, sales promotion, personnel, accounting and record keeping, and on other matters. In addition, these fieldmen will conduct a sales clinic or a salesmanship lecture for store personnel, and counsel a prospective franchise holder on the location of his store and terms of the lease.

15. Fieldmen call on the franchise holders from two to ten times a year and work exclusively with dealers on the franchise program; except when calling on other dealers to persuade them to go on the program, and during the "conversion" period when a dealer is about to go on the program.

16. Fieldmen assist in filling out monthly reports by the franchise holders. This report is sent to the respondent and shows the performance of each line for that month and the ending inventory. Fieldmen also help fill out the buying guide for the franchise holders. This buying guide is used in restocking a store, and helps the dealers determine the amount of shoes he will buy for the season. The buying guide contains statistics taken from the monthly reports, so that the franchise holder knows the performance of all his lines at the end of each season. The buying guide is prepared prior to the two buying seasons, which are spring and fall.

17. The accounting and record keeping system furnished through the franchise program is a complete record system for a shoe store. Franchise holders are given a continuing supply of these forms. One of the forms supplied is the monthly report, which the Franchise Agreement requires to be made regularly, but which many dealers make less frequently.

[fol. 25] 18. Respondent has an arthitectural department that will completely design a new store or draw plans to remodel an existing store in its entirety. As many as half of the franchise holders have used this service. Although the service is available to other retailers who concentrate

on respondent's shoes, 70-75 percent of the architects' time is devoted to working on plans for franchise stores.

19. Under an arrangement with U. S. Rubber Company, respondent receives a commission on purchases of U. S. Rubber Company footwear by dealers on the franchise program. For the fiscal year ending October 31, 1959, respondent received commissions totaling $171,417.00. Respondent pays U. S. Rubber Company for the canvas and waterproof footwear purchased by the franchise dealers. U. S. Rubber Company ships the footwear directly to the dealers and respondent bills the franchise dealers. During 1959 there were 473 franchise dealers purchasing rubber or canvas footwear under this arrangement. From 1950 to October 21, 1955, respondent represented to franchise dealers that they would receive the following additional discounts on purchases through respondent, over and above the discounts available if purchased directly from U. S. Rubber Company:

Storm Footwear

Advance orders of more than 144 pairs and less than 480 pairs—3 percent.

Fill-in orders if bought in 12 pair runs and if merchants ordered more than 144 pairs on advance orders —8 percent.

Keds

Fill-in orders if bought in 12 pair runs and if merchants ordered at least 480 pairs on advance orders—8 percent.

These additional discounts were not made available by respondent to customers other than franchise dealers.

20. From 1956 up to 1959 respondent represented to franchise dealers that on this storm footwear and Kedettes they would get the 8 percent discount and 2 percent cash discount by purchasing 144 pairs, instead of having to [fol. 26] purchase 480 pairs to get those discounts if they were not on the franchise program. Respondent represented that on fill-in orders on these shoes the franchise dealers would get an 8 percent discount for buying 12 or more pairs which was not available to dealers not on the franchise pro-

gram. On Keds, the discount on fill-in orders is still in effect, and this discount is available only to respondent's franchise dealers.

21. Respondent represents to franchise dealers that they will be participating in group purchasing of fire, public liability, robbery, safe burglary, business interruption, and life insurance. From November 1, 1949, to October 31, 1955, respondent represented that merchants on the franchise program would receive a discount in price on fire insurance not available to individual outlets and represented to them:

> "Because of the favorable experience the insurance company has had with our Franchise Store operators during the past 25 years, we are in a position to save the retailer approximately 25% on his fire insurance premium compared to his local rate."

Respondent has continued to represent that there would be considerable savings on insurance purchased through the franchise program. Respondent supplies the average inventory of the franchise holders to the insurance company, and for this service is compensated by the insurance company.

22. In addition to the benefits and services which dealers receive under the Franchise Agreement, many Brown Franchise Dealers have received loans from respondent. These loans are as high as $30,000. On October 31, 1957, the total amount of loans to all dealers, including those under the franchise program, was $844,886.83.

23. Large outside illuminated Roblee and Buster Brown signs and neon Naturalizer signs are given to dealers who aggressively push those lines and sell them effectively, and are not handling conflicting lines. The dealer pays $1.00 for the outside sign, and he pays the maintenance cost, and the sign is given to the dealer until he stops handling the shoes, in which case, respondent takes the sign down. Brown Fran-
[fol. 27] chise Dealers have 30 of the 51 Roblee signs which respondent has given out, and they have 53 of the 115 Buster Brown signs given out.

24. Window decoration service for which there is a charge and the architectural service are offered to other dealers who concentrate on respondent's lines, as well as to Brown Franchise dealers. Respondent also gives dealers

window decoration without charge, such as neon signs and cards.

25. The forms upon which the Brown franchise fieldmen submitted their reports state: "Encourage Concentration on B. S. C. Lines and Elimination of Conflicting Lines". A newer form has eliminated this statement, but the omission did not change the practice.

26. The following written instructions to fieldmen by the manager and the assistant manager of the Brown Franchise Program show the policy of encouraging the concentration on Brown lines and the elimination of conflicting lines:

> "This week our Buster Brown sales representative, Frank Mirra, called me and among various things discussed, he advised that he had just learned that Orville Shugart plans to buy American Girl line for Fall.
>
> "George, let's get into this immediately and head this off before the shoes are received in the store. As you know, if the American Girl line is purchased, this will not be in keeping with our Franchise Program."
>
> "I think it is time for a forthright discussion with Mr. Bump on what we attempt to accomplish with dealers who operate their business on our Franchise Program. If he does not see the wisdom of going along with the thought of operating these stores more progressively, avoid directly conflicting purchases, then I think we have no other alternative then to ask him to withdraw from the program."
>
> "The one very important point that concerns me, T. R., is that you say he can get a better mark up on men's Great Northern shoes and that his customers [fol. 28] want leather soles. If this be the case and he is determined to continue to carry Great Northern instead of Pedwin, then we have no other alternative than to ask him to withdraw from the Franchise Program."

27. Such evidence as there is relating to action taken by the fieldmen in following these instructions indicates that they sometimes failed to achieve the desired results, and it appears that respondent's home office was sometimes lax in enforcing its policies, although, as hereinafter found, some

dealers were dropped from the program for failing to comply with this policy. The manager of Brown Franchise Stores Division testified that there was a point at which a dealer would be dropped from the program for carrying conflicting lines.

28. The manner in which the fieldmen encourage concentration on Brown lines and the elimination of conflicting lines is shown in the following excerpts from their reports:

> "Outside lines were analyzed, and the unprofitable performance of these lines pointed out to the management. One line of ladies shoes that was bought in 8 patterns last spring, was cut to 4 patterns for the Fall buy, and will be reduced even further for next Spring's buy."
>
> "The only problem in this store, in-so-far as we are concerned, is the presence of an outside line of shoes. Tom and I talked with Clarence about this and he agreed to give the Life Stride serious consideration before buying next season. Apparently he was not aware of the strength of Life Strides and the strong position it holds in the stores."
>
> "I will do everything possible to get this other line out of the store."
>
> "A good portion of Jack's inventory represents spot shoes from outside lines and in talking with Jack he admits that these represent a small percentage of his sales and are not needed. In most cases they amount to overlapping patterns. Three lines of shoes will be eliminated this coming season."
>
> "Outside lines were discussed and she also agrees that most are not necessary and will be discontinued."
>
> [fol. 29] "Concentration on fewer lines and less patterns was discussed and will be applied more this fall. Debs are to be discontinued and Shelby Arch type shoes are to be replaced with Propr-Bilt."
>
> "Concentration on fewer lines was discussed and it was decided to discontinue Golo dress flats and Grinnell sports."

29. During the fiscal years 1949 through 1955, respondent dropped 22 stores because of a failure to comply generally with the conditions of the Brown Franchise Agree-

ment, one of the conditions being the prohibition against handling conflicting lines. Respondent, in that period, dropped 19 stores for handling conflicting lines which was "completely contrary to the franchise agreement". From November 1, 1954, through April 1, 1958, a dozen or more dealers were dropped from the Brown Franchise Program primarily because they handled conflicting lines.

30. The Brown Franchise Dealers probably buy on an average about 75 percent of their total volume of shoes from respondent.

31. Shoe manufacturers try to have only one account carry each of their lines in a town or trading area. U. S. Shoe Corporation gives May Company Department Stores a 10-mile radius "protection". Freeman Shoe Corporation sells to only one account in a small town. So does respondent. Most Brown Franchise Dealers are found in towns of from 5,000 to 30,000 population, and in almost all instances there is only one franchise store in each community. Some manufacturers will put their line of shoes in two outlets in a town if one is a shoe store and the other is a department store.

32. Price is a factor in determining which outlets are available to a manufacturer. Not all retail shoe outlets are desirable customers for this reason. The outlet may stock shoes ranging too far below or too far above the manufacturer's suggested resale price to be a suitable outlet.

33. There are nearly 100,000 retail outlets in the United States which sell shoes. Many of these sell only a particular [fol. 30] style of shoe, such as cowboy boots in a western store, or baby shoes in a baby store. Many also have few shoes in relation to their total inventory, their shoes being carried as a side line. Among the outlets which sell shoes are the following types:

Grocery store	Drug store	Dollar store
Dry Goods	Surplus store	Health store
Variety store	5 & 10	Pawn shop
Shoe repair shop	Western store	Curio shop
Hardware store	Supermarket	Indian Post
Sporting goods store	Army Surplus store	Cafe

Saddle shop	Leather goods store	Glass manufacturer
Work clothes store	Zink smelter	Commissary
Oil company	Gun store	Baby store
Specialty store		

34. Brown Franchise Stores are choice retail shoe outlets. Because these stores are family shoe stores they are considered a prime market by respondent's competitors. They are considered most desirable from a volume as well as a credit standpoint. The average volume of sales in 1960 for stores on the Brown Franchise Program was $97,000. The average return on investment for these stores has been 16 percent as against 11.8 percent for all independent shoe stores. Respondent characterizes its franchise dealers as the "most prosperous group of shoe retailers in America" and states that the Brown Franchise Program is not available to any shoe store but is best fitted for the "outstanding dealers" in each community.

35. Representatives from six of respondent's competitors testified that they were foreclosed from selling Brown Franchise Dealers generally. They testified that their sales volume was reduced or lost entirely to customers who became Brown Franchise Dealers. Most of them gave specific examples, some of which were erroneous, but it is clear that they lost volume to these accounts and some of them lost accounts completely. By the very nature of the transition of dealers to the Brown Franchise Program it would be [fol. 31] expected that many competitors would lose accounts completely to Brown and that others who did not lose the accounts would lose sales volume to these accounts. The question to be resolved is whether they, and as a consequence competition, were likely to be adversely affected by the restriction the Brown Franchise Program placed on the dealers to refrain from dealing in conflicting lines. The terms of the agreement are clear and the dealers undoubtedly knew what they had agreed to do, and when the written agreements were replaced with oral agreements, with the newer accounts in recent years, the terms were the same. The dealers could not know positively how rigidly they would be required to adhere to their agreements, but it

must be inferred that many of them would abide by their agreements to the letter. Over the years most of these dealers have learned that respondent will condone some duplication of lines, particularly if the outside line is a short line or a specialty line or if the real volume is in respondent's lines, because five out of six of them carry at least one line that competes to some extent with a Brown line. There is a point beyond which outside lines will not be tolerated by Brown, and it is believed that generally the dealers know what it is.

36. It is therefore found that the restrictive provision of the agreements between respondent and its Brown Franchise Stores Division dealers was a major factor in foreclosing markets to the competitors who testified herein, as well as to other competitors of respondent, and as a consequence competition has been adversely affected as will be hereinafter more specifically found.

37. Respondent contends that the contract requirement has been abandoned and that most of the present franchise holders have not signed a written agreement containing the restrictive provision. It also contends that it was not enforced and that the restrictive contract could not have had adverse effects. The evidence does not support these contentions, except that in recent years the written contract has not been used in bringing stores under the franchise plan, and many of the franchise holders testified that the restrictive provision was not called to their attention or enforced.

[fol. 32] 38. The evidence shows that the restrictive provision against handling conflicting lines has been enforced and will continue to be enforced and that it necessarily inhibits franchise holders from buying other brands which they would buy if they were not restricted.

39. It may be, as respondent contends, that for some retailers it would be an unwise business practice for them to carry conflicting lines, but the law protects the buyer's freedom of choice, even if the choice is uneconomic for him.

40. Respondent also contends that most franchise holders carry other lines, some of which are conflicting, and that this shows a lack of effectiveness of any restrictions if any there be. Most of the important conflicting lines carried by the franchise holders are short lines of specialty

shoes, such as Clinics (primarily for nurses) and Hush Puppies (loafers), which are condoned, but it is clear that respondent will remove customers from the plan when it considers the restrictive provision has been seriously breached. It will continue to sell these customers, but will not continue the benefits which accrue to Brown Franchise Plan customers.

41. The question remaining is whether the adverse effects of the practice may be substantial.

Although respondent is the second largest shoe manufacturer in the country, its sales through the Brown Franchise Plan are less than 1 percent of all shoes sold in the United States. It confines its production to medium-priced shoes which limits the area of effective competition to some indeterminate extent, but since most of these Brown Franchise Plan customers are in cities of 5,000 to 30,000 population, it would appear that the greatest effect of the restrictive provision would be felt in these localities. The substantiality of the effect is distorted by attempting to compare the market share sold through the franchise plan to the total United States market. It appears that each trading area where a Brown Franchise Plan account is located would be the appropriate geographical market in which to appraise the effects of the restrictive provision because the retail shoe [fol. 33] market is not a national market except to the slight extent that shoes are bought by mail. Because of custom, convenience, necessity, or perhaps other reasons, consumers usually purchase shoes in their local communities and it is the aim of most shoe retailers to give their customers such service and value as will retain their patronage. Considering the importance of fitting shoes, it is believed that purchases of shoes by mail constitute only a small part of the total sale of shoes and that the retail shoe market is essentially a series of local markets. In these trading areas the market share of the stores under the Brown Franchise Plan is, of course, much higher, and the number of retail competitors varies from about 5 to about 26.

42. Since there are about 600 such trading areas, in most of which the effect of the restrictive provision is substantial, it is concluded that the total effect on competition is substantial. The benefits of unrestricted competition should

be permitted to flow to competitors of respondent, to customers of respondent and their competitors, and to consumers. In many trading areas the benefits of competition are hindered by respondent's restrictive provision.

43. At least two other shoe manufacturers, which sell men's, women's, and children's shoes in direct competition with Brown, have franchise stores programs somewhat similar to respondent's program.

International Shoe Company, the nation's largest shoe manufacturer, sells men's, women's, and children's shoes under a variety of brand names which compete directly with Brown brand shoes. International has a franchise stores program under the direction of its Merchants Service Division, and the independent shoe retailers which operate on that program are known as Merchants Service Stores. In order to obtain the benefits and services available under the program, a Merchant Service Dealer agrees to feature the shoes of a division of International, in each type of shoes (men's, women's, and children's) he carries, and at all times to handle such shoes in a representative manner.

[fol. 34] General Shoe Company sells men's, women's, and children's shoes under a variety of brand names which compete directly with Brown brand shoes. General has a franchise stores program under the direction of its Genesco Retailers Service Agency, and the independent shoe retailers which operate on that program are known as Friendly Franchise Stores. In order to obtain the benefits and services available under the program, a Friendly Franchise Dealer agrees to purchase sufficient quantities of footwear from General, in each type of shoes (men's women's, and children's) he carries, as are necessary to assure the presence of an adequate and representative stock of merchandise in the Friendly Franchise Store at all times.

This record does not show whether the requirements of these contracts of International and General are construed to require the dealers to refrain from buying competitive shoes, but to the extent they are so construed, or to the extent they tend to create captive customers, the market open to the many sellers of shoes would be further restricted.

44. It is found and concluded that the effect of the methods, acts, and practices of the respondent, as hereinbefore found, has been, is, or may be, substantially to lessen, hinder, restrain, and suppress competition in the purchase and sale of shoes in interstate commerce; to cause a substantial number of retail shoe dealers to refrain from, or discontinue, buying and dealing in shoes of competitors of respondent; to exclude, or attempt to exclude, competitors of respondent from selling shoes to a substantial number of retail shoe dealers; to foreclose competitors of respondent from a substantial share of the retail dealer market in many trade areas; and to enhance the dominant position of the respondent in the shoe industry.

Count II

45. The foregoing findings numbered 1 through 10, 22, 34, and 38 relate to the charges in Count II of the complaint and it is so found. They are incorporated herein at this point by reference.

[fol. 35] 46. Respondent contends it does not require or attempt to require its dealers to adhere to its suggested resale prices. The evidence shows that respondent has a definite policy of seeking adherence to its announced or advertised resale prices and shows instances where, on two different occasions each, attempts were made to secure the adherence of two price cutters to suggested resale prices. It is not clear whether these attempts resulted in agreements with the customers each time, but they appear to have ultimately come into line with respondent's policy. In any event, respondent resorted to several means in an effort to bring this about, which included sending salesmen to advise the dealers of Brown's policies, telephoning one of them from the central office urging adherence, instructing salesmen to advise the dealer that continued lack of conformance would result in his being disenfranchised, arranging a meeting between its price-cutting dealer and a non-price-cutting dealer, urging that they agree upon adhering to suggested resale prices, attempting to suppress advertising of discount prices, and checking these dealers at a later time to determine whether they were conforming.

47. Each of the respondent's selling divisions publishes wholesale price lists for the brand or brands of shoes sold

by it. The Buster Brown and Robin Hood lists contain "suggested" retail prices. The United Men's and Roblee lists contain a schedule showing the retail price to be charged for each different wholesale price category. The women's and girl's shoe price lists do not contain a "suggested" retail price, but a suggested markup of "44 or 45 percent" is communicated to the customers orally by the salesmen. Because dealers know what the recommended markup is, they know automatically the suggested resale price. In addition, most of the respondent's selling divisions send out suggested retail price lists each season.

Respondent publishes suggested resale prices for some of its shoes in full page advertisements in magazines having national circulation. These ads often give a specific price for the shoe illustrated, as well as a price range for the line.

[fol. 36] 48. Respondent's director of marketing testified concerning customers of respondent who do not abide by the suggested resale price:

> "Now, once in a while a fellow will get an idea that he is going to have an advantage, and we will try to get him turned around to where he wants to sell his shoes at the regular markup which other merchants are doing."

In response to a question as to the instruction given to salesmen who are sent to see price-cutting merchants, he said:

> ". . . we have to go over and see this fellow and try to dissuade him from that practice . . . you have got to make your peace over in that area or you will lose several customers. So you have got to straighten it out.
>
> "So the way to straighten it out is to try to show him the error of his ways and get him on the right basis because this practice of selling shoes at a discount price level is an almost inflexible thing with our brand of shoes. And when he is doing that he is in trouble."

When respondent first establishes a sales relationship with a retailer, the program of adherence to retail prices is discussed. Respondent's director of marketing was asked:

"When you take a new outlet that hasn't been in the shoe business you wouldn't know whether he is going to be a price cutter or not?"

He responded:

"Oh yes. You talk to him quite a while before you sell him, telling him what is expected of him."

The result of these conversations is that price-cutting dealers rarely get on the respondent's books.

49. During the summer of 1956, Fraver's Shoe Store of Chambersburg, Pennsylvania, a Brown franchise store, cut the price on certain patterns $1.00 below the recommended price. Paul Dutrey, another Brown franchise holder with [fol. 37] stores in Waynesboro and Carlisle, Pennsylvania complained of this price cutting and he received help from respondent. George Croker, the Brown Franchise Stores Division field representative, was sent to see Fraver and he got Fraver and Dutrey to "have a cup of coffee together and talk it over" so that they could "have an agreement on the prices on their shoes." Croker reported back to J. R. Johnston, manager of the Brown Franchise Stores Division, that "Mr. Fraver has assured me he will maintain the prices on our shoes so ther ewill be no confliction in the future." Croker's purpose in writing to Johnston was "To indicate to the St. Louis office that these two parties has—was going to get together and iron out any differences that they had in their thinking." Croker did get Fraver to agree to the "proper mark-up." Johnston wrote to Croker and stated that: "We certainly appreciate Fraver's willingness to cooperate".

50. Fraver apparently resumed price cutting because Johnston called him concerning his price cutting in June of 1957. On October 5, 1957, Dutrey directed a letter to Johnston complaining that Fraver was "* * * still underselling your shoes in every line." This letter was answered by T. R. Curtis, the assistant manager of the Brown Franchise Stores Division, who assured Dutrey that the field representative, George Croker, had been ordered to "* * * contact Fraver for the purpose of having a thorough understanding that he must discontinue this practice." In his letter to Croker, Curtis instructed:

"* * * we want you to again, personally, contact Fraver for the purpose of discussing the necessity of his selling our lines at our recommended retail prices and if he does not agree to this, then it will be necessary for us to discontinue selling him. He will, perhaps, agree to our recommended prices and if so, be sure to have a very thorough understanding that if he does under-price the lines in the future, it will be necessary for us to discontinue our business relationship."

In addition, the fieldman was told to contact Dutrey after visiting Fraver "* * * so he will know this is being taken care of."

On October 14, 1957, Dutrey again complained about Fraver's cutting prices, and this time threatened to discon- [fol. 38] tinue purchasing Brown shoes "* * * unless we get satisfactory guarantees from you that this practice will stop * * *". Upon receiving this complaint, Johnston again telephoned Fraver, with the result that he was able to telegraph Dutrey that Fraver "* * * agrees to abide by suggested retail prices all patterns of Brown Shoe Company lines he carries." And Johnston followed the telegram with a letter which read:

"This letter will follow up my telegram regarding the discussion I had with Mr. Fraver over at Chambersburg regarding the pricing of certain Brown Shoe Company patterns. I talked with him at considerable length on why it was necessary that we ask him to abide by our suggested retail prices and he agreed to do just that.

"He will remark any patterns that are necessary, at once, and I am confident that we will not have a recurrence of this situation. I have much respect for Mr. Fraver's integrity and with the long association we have enjoyed I know we can count on him to keep his word."

The manager of the Brown Franchise Stores Division also wrote to all the selling divisions of Brown telling them of Fraver's price cutting and recommending "* * * that when you call on Mr. Fraver from time to time that you

check the retail prices for your particular line of shoes and make sure he is abiding by your suggested prices other than during clearance sale periods."

51. On June 15, 1956, Pomeroy's, a department store in Harrisburg, Pennsylvania, advertised Roblee shoes which normally sell for $10.95 to $16.95 at a sale price of $6.99. Mr. Dutrey of Carlisle, Pennsylvania, complained to Brown that this action by Pomeroy's breached an agreement between Brown Franchise Dealers and the respondent as to when a clearance sale, with attendant reduced prices, was to be held.

Stanley Bozaich, manager of the Roblee Division, immediately contacted his salesman, John Mirra, and asked: "I want to know how come Pomeroy's ran this ad on June 15 showing these two shoes, as we have discussed previously [fol. 39] that this would not happen and our program on Roblee sales was definitely pointed out to them." And, he later wrote to the salesman and said:

> "Regarding your conversation with Al Schwarz relative to the ad of June 15 in which they advertised Roblee shoes on sale, I believe you know the policy of the Company and this is definitely not allowed.
>
> "Roblee shoes go on sale twice a year in July and January. Any other sale promotion on Roblee shoes is not to be advertised as such.
>
> "I want you to straighten this out with Al Schwarz so that in the future regardless of whether we give him close-outs or he is running out his regular stock, this is not to happen."

The manager of the Brown Franchise Stores Division wrote to Dutrey and said that he had been taking care of the price cutting by Pomeroy's by "* * * telephone conversations with the salesman, with the merchandising manager of Pomeroy's, correspondence, etc." He said that in contacting the Roblee salesman and the sales manager about the price cutting, they "* * * have authorized me to give you their assurance that there will not be a recurrence of this."

52. In September of 1956 Pomeroy's again advertised Brown shoes below the suggested list prices and this time both Buster Brown and Roblee brands were involved.

Dutrey complained to the president of Brown and he advised Dutrey that the matter was "* * * being given thorough attention * * *". The "attention" consisted, in part, of the issuance by the Roblee Division sales manager Bozaich to his salesman, Mirra, the following instruction:

> "Before I took any actual action with Pomeroy's I wanted to write and inform you of this situation. At this time I am going on record and telling you if this happens once again we will be forced to withdraw Roblee shoes from the Pomeroy store in Harrisburg.
>
> "I understand a change in merchandise men is going on at the present time at Pomeroy's, however, putting a sale on Brown Shoe Company products and advertis- [fol. 40] ing them at this particular time of the year is definitely against Company policy and we will not adhere to these principles.
>
> "You will probably have to make a trip to Harrisburg to get this thing straightened out. The above facts will definitely have to be given to Pomeroy's since we do not want a repetition of this in the future."

53. Mirra made the trip to Harrisburg and went to see Moskowitz, who had succeeded Schwarz as merchandising manager at Pomeroy's. Mirra testified concerning his conversation with Moskowitz:

> "* * * I said to Mr. Moskowitz, I realize that cleaning stock was very important and adjusting the inventory was very important but if he would just not advertise —put these shoes in the newspaper, just sell them, put them on the table and sell them so I could get Mr. Dutrey off my back."

54. The sales manager of the Buster Brown Division reported:

> "Our salesman Tufshinsky has contacted these people and has their assurance that there will be no further cut-price promotions on our shoes at any time other than our Semi-Annual Sale periods."

55. That the above action by the sales managers of the Roblee and Buster Brown Divisions was taken at the be-

hest of the president, Clark Gamble, is shown by a letter from the Brown Franchise Stores Division manager, Johnston, to his field representative, Croker, in which letter he stated: "Mr. Gamble has insisted that the Sales Managers of these divisions get this situation straightened out. I am sure it will be." That rigid price maintenance is the official policy of Brown, endorsed and supervised by its highest official, is indicated by a memo to Gamble from Tom Curtis, assistant manager of the Brown Franchise Stores Division, which reads as follows:

> "Dick Dutrey, son of Paul Dutrey who wrote you the attached letter, telephoned us about this situation on Monday of this week, I, personally, talked to Paul Dutrey this morning prior to having learned that he had written you and had sent in copies of the ads. In my [fol. 41] conversation, I assured him that this will be properly taken care of with Pomeroy's, in keeping with our pricing policies.
>
> "I have discussed the Roblee under-pricing with Stan Bozaich and understand we had this same difficulty with Pomeroy's earlier this year. Stan is writing John Mirra, the Roblee Sales Representative selling Pomeroy's, instructing him to contact the account for the purpose of getting this straightened out so there will be no reoccurrence of under-pricing."

56. Some of respondent's dealers occasionally vary their resale prices from respondent's suggested prices by 50 cents or a dollar on some styles without complaint from respondent or any competitor, but there is no evidence that their competitors or respondent were aware of these deviations.

57. Respondent has required, and attempted to require, certain of its customers to agree to maintain resale prices established by respondent, and through the use of such policy and practice has suppressed and eliminated price competition between customers.

Conclusion

The acts and practices of respondent as herein found are all to the prejudice of competitors and customers of the respondent and of the public, have a tendency to hinder,

prevent and restrain, and have actually hindered, prevented and restrained, competition in the purchase and sale of shoes in interstate commerce, and constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

Order

It Is Ordered that respondent Brown Shoe Company, Inc., its officers, representatives, agents, employees, subsidiaries, successors, and assigns, directly or through any corporate or other device, in or in connection with the offering for sale, sale and distribution of shoes, in interstate commerce, do forthwith cease and desist from:

[fol. 42] 1. Entering into, continuing in operation or effect, or enforcing any agreement or understanding with any customer or prospective customer or imposing any condition upon any customer or prospective customer, which has the purpose or effect of precluding such customer or prospective customer from independently determining whether shoes will be purchased by such customer or prospective customer from any competitor of respondent or from independently determining the volume of such shoes to be purchased.

2. Obtaining or attempting to obtain from any customer or prospective customer any agreement, understanding or assurance concerning the price at which any shoes are to be resold.

3. Entering into, continuing, or enforcing any agreement or understanding with any customer or prospective customer concerning the price at which any shoes are to be resold.

Edward Creel, Hearing Examiner.

January 22, 1962.

BEFORE FEDERAL TRADE COMMISSION

PETITION FOR REVIEW—Filed February 19, 1962

Comes now petitioner, Brown Shoe Company, Inc., and respectfully requests the Federal Trade Commission to review the findings of fact, conclusions and order made and issued by Hearing Examiner Edward Creel in his initial decision in the above matter filed January 25, 1962 and served upon petitioner February 2, 1962.

Questions Presented for Review

In arriving at an ultimate determination of whether petitioner has engaged in unfair methods of competition and unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act, two basic questions are presented for review by this Commission.

[fol. 43] The basic question which arises under Count I of the complaint is

> Whether, on the basis of the record evidence, the Hearing Examiner erred in finding and concluding that the effect of the methods, acts, and practices of the petitioner, in connection with its franchise program, has been, is, or may be, substantially to lessen, hinder, restrain, and suppress competition in the purchase and sale of shoes in interstate commerce; to cause a substantial number of retail shoe dealers to refrain from, or discontinue, buying and dealing in shoes of competitors of petitioner; to exclude, or attempt to exclude, competitors of petitioner from selling shoes to a substantial number of retail shoe dealers; to foreclose competitors of petitioner from a substantial share of the retail dealer market in many trade areas; and to enhance the dominant position of the petitioner in the shoe industry.

The basic question presented under Count II of the complaint is

> Whether, on the basis of the record evidence, petitioner has required, or attempted to require, its customers to maintain resale prices established by peti-

tioner and, through the use of such policy and practice, has suppressed and eliminated price competition between customers.

The consideration and determination of these basic questions must also include a review of the following questions of law and fact.

As to Count I:

(a) Whether the Hearing Examiner erred in finding and concluding that petitioner's franchise program, under which it grants benefits and services of the type and character in evidence to retailer customers who concentrate on buying the lines of shoes manufactured by petitioner, is unlawful, in view of the fact that the reliable, probative and substantial evidence in the record showed, among other things, that

[fol. 44] (1) Competitors of petitioner are not foreclosed from selling their shoes to shoe retailers operating on petitioner's franchise program;

(2) Shoe retailers operating on petitioner's franchise program are free to withdraw at any time from the program; and

(3) The amount of commerce affected by petitioner's franchise program is not substantial.

(b) Whether the Hearing Examiner erred in finding and concluding that Brown franchise stores are foreclosed to competitors of petitioner and that said franchise stores are prevented by petitioner from buying other brands or lines of shoes, in view of the fact, among other things, that

(1) The testimony of the franchise dealers called as witnesses showed conclusively that they were free to buy from any shoe manufacturer they desired;

(2) The testimony of the six manufacturers called as witnesses herein was so filled with hearsay, speculation, conjecture and error as to render it unacceptable as a basis for findings of fact and conclusions;

(3) The record evidence clearly showed that competitors of Brown can and do sell shoes to Brown franchise stores; and

(4) Such finding was arbitrary and capricious and not supported by the reliable, probative and substantial evidence in the record.

(c) Whether the Hearing Examiner erred in determining that the individual trade areas in which Brown franchise stores are located was the appropriate geographical market in which to appraise and determine the effect of petitioner's franchise program upon competitors of petitioner, in view of the fact that the evidence affirmatively showed, among other things, that shoe manufacturers sell and ship shoes to retailer cus- [fol. 45] tomers throughout the entire United States, and that the proper geographical market area in which to appraise and determine the effects of petitioner's franchise program on its competitors is the nation as a whole.

(d) Whether the Hearing Examiner erred in finding the amount of commerce affected by petitioner's franchise program is substantial, in view of the fact that the evidence showed, among other things, that sales through petitioner's franchise program are considerably less than 1 per cent of all shoes sold by shoe manufacturers in the United States.

(e) Whether the Hearing Examiner erred in finding that the effect of petitioner's franchise program is substantial, and that competition is hindered by petitioner's franchise program, in many of the trading areas in which Brown franchise stores are located, for the reasons, among others, that such finding was arbitrary, speculative and not based upon reliable, probative or substantial evidence in the record.

(f) Whether the Hearing Examiner erred in ruling, on July 20-21, 1961, over the objection of petitioner, that petitioner could not call as witnesses any more franchise dealers to testify to the same or similar matters testified to by franchise dealers previously called as witnesses, for the reason, among others, that he did, by such action and ruling, deprive petitioner of its right to a defense, constituting a denial of due process of law.

As to Count II:

Whether the Hearing Examiner erred in finding and concluding that petitioner has an official policy of rigid price maintenance, and a definite policy of seeking adherence to its announced or advertised resale prices, in view of the fact that the reliable, probative and substantial evidence in the record showed, among other things, that

(1) There were only two instances out of the entire dealings of petitioner with its thousands of customers over the years in which it could be alleged that attempts at adherence to petitioner's suggested resale prices were even considered;

[fol. 46]

(2) No agreements or arrangements concerning the price at which petitioner's shoes were to be resold were ever made or entered into in either of the two instances;

(3) Petitioner's customers independently determined the prices of the shoes they sold; and

(4) There was no evidence in the record that any act by petitioner had ever prevented or in any way hindered the independent or voluntary determination by petitioner's customers of the prices at which any shoes were sold by them.

As to Counts I and II generally:

Whether the Hearing Examiner erred in making certain other findings of fact and conclusions, too numerous to mention specifically, for the reasons that such findings and conclusions are arbitrary, speculative, incomplete, contradictory and misleading, and not supported by the reliable, probative and substantial evidence in the record.

Finally, the following question is presented for review, in connection with the order made and issued by the Hearing Examiner in this matter.

Whether the Hearing Examiner erred in making and issuing his order against petitioner in this matter for the reasons, among others, that

(1) Said order is too vague and indefinite to be enforceable;

(2) Said order is too vague and indefinite to properly inform petitioner of its duties and obligations thereunder; and

(3) Said order is excessively broad in scope and does not properly conform to the complaint or the evidence in this matter.

[fol. 47] Statement of Facts

Petitioner, Brown Shoe Company, Inc. is a New York corporation with principal offices located in St. Louis County, Missouri. It is primarily engaged in the manufacture and distribution of shoes at the wholesale level. Petitioner manufactures a broad line of medium priced branded shoes for men, women and children. It also manufactures shoes which are sold to certain retail stores, chain stores and mail order houses for resale under the private brand names of such customers.

Shoes manufactured by petitioner are principally marketed by sales at wholesale to independent retail shoe customers, including individual shoe stores, chains of shoe stores, specialty stores, department stores and various other types of retail outlets. At the time the complaint in this matter was issued, petitioner was actively selling to approximately 6000 independent retail shoe customers located throughout the United States. Total sales of petitioner to these 6000 customers for the fiscal year 1959 were $111,292,872.

Petitioner's total sales for the fiscal year 1959 of shoes and all other articles, at wholesale and retail, including the sales of all subsidiaries, were $276,549,164. Its sales for the same period, not including sales of or to its subsidiaries, were $113,359,505. According to published industry figures, petitioner with its subsidiaries was second in dollar sales and third in pairage production in the shoe industry in 1958 and 1959.

The record in this matter shows there were between 900 and 1000 separate manufacturers of leather shoes in the country in 1959. Leather shoe manufacturers produced 522.5 million pairs of shoes in 1950 and they produced over 632 million pairs in 1959. It is estimated that total dollar sales by manufacturers of shoes in the industry as a whole

in 1959 were approximately $3\frac{1}{2}$ billion dollars. The record also shows that there were nearly 100,000 retail outlets selling shoes in the United States in 1959.

Petitioner has a franchise stores program which was started in 1921. The purpose of the program was and is [fol. 48] to help the independent retailer who wishes to carry petitioner's branded lines become a better and more successful merchant. Fieldmen who service the franchise accounts offer guidance to them with retailing and merchandising problems, help them with record keeping and accounting, and encourage the dealer to concentrate on a few lines so that he can do a more profitable job.

It was stipulated in this proceeding that as of November 20, 1959, a total of 682 independent retailer customers of petitioner were operating on its franchise program. Total sales by petitioner to these 682 retailers for the fiscal year 1959 were $24,675,617. This was less than 1 per cent of all shoes sold in the United States during that same year.

The franchise stores are, for the most part, located in towns or cities having populations of from 5000 to 30,000 persons and in almost all instances there is only one franchise store located in a community.

Count I of the complaint issued herein on October 13, 1959, alleged in substance that petitioner was guilty of unlawful exclusive dealing practices in connection with its franchise program. The complaint charged that valuable benefits or services were received by Brown franchise stores from or through petitioner, and that as consideration for these benefits or services the franchise stores were required to concentrate their purchasing in the grades and price lines of shoes sold by petitioner and were prohibited from purchasing, stocking, or reselling shoes manufactured by competitors.

Counsel for the complaint, to support the charges, relied primarily upon a written franchise agreement which petitioner had with approximately one-third of the franchise dealers, excerpts from fieldmen's reports and testimony by six shoe manufacturers who claimed they were foreclosed from selling their lines of shoes to Brown franchise stores.

Petitioner introduced evidence through exhibits and witnesses, which showed that in fact its competitors could [fol. 49] and did sell their lines of shoes to Brown franchise stores, and that this was true as to the six manufac-

turers whose representatives testified they were foreclosed. Petitioner called as witnesses 34 franchise dealers and two former franchise dealers, who testified to their understanding of the Brown franchise program and their experiences as participants in it. They testified that they were free to leave the Brown franchise program immediately at any time they so desired, and that they, like other shoe retailers generally, were guided in their selection of shoes by considerations of profit and performance. They further testified to their individual freedom to buy whatever lines of shoes they wished. Petitioner was precluded from calling additional franchise dealers to testify as to the same or similar matters by a ruling of the Hearing Examiner made July 20-21, 1961, to which petitioner took exception.

Count II of the complaint charged that Brown forces and requires, or attempts to force and require, its retail shoe store customers to agree to maintain arbitrary, non-competitive resale prices fixed and promulgated by Brown.

In support of this contention, counsel for the complaint relied upon documentary evidence of two instances of alleged attempts by petitioner to secure adherence to its suggested resale prices, and upon his construction of testimony given by petitioner's employees.

Petitioner denied such charges and introduced evidence which directly refuted the alleged instances of adherence to its suggested retail prices, and petitioner pointed out that the evidence relied upon by counsel for the complaint was limited to two instances out of the myriad of business contacts and communications petitioner had with its 6,000 customers throughout the country. It showed that its retailer customers are completely free to independently and voluntarily determine the prices at which any shoes are resold by them.

The hearings in this matter were concluded on October 31, 1961. Proposed findings of fact and conclusions were filed by both sides, oral argument was had thereon, and [fol. 50] on January 25, 1962 the Hearing Examiner filed his initial decision, which was thereafter served on February 2, 1962. In his decision the Hearing Examiner found against petitioner on both counts of the complaint. Petitioner now seeks to have this decision and the accompanying order reviewed by this honorable Commission.

Review Is in the Public Interest

Review by the Commission of the questions presented for review by petitioner is in the public interest for several reasons.

A review of the substantial questions of fact and law presented by the petitioner is necessary and appropriate in order to insure to petitioner a just and proper disposition of this matter and to protect its rights herein.

The quesions presented for review involve matters of importance, not only to petitioner but to the business community generally.

This case raises a question of first impression. Insofar as petitioner is aware, there are no reported cases in which the granting of benefits and services of the type and character in evidence to customers who concentrate their business with petitioners so long as they choose to do so, and who can withdraw from the program at any time, has been held to foreclose competitors and thereby constitute an unfair method of competition.

Petitioner believes that the findings and conclusions of the Hearing Examiner as to the substantiality of the effect of the Brown franchise program are in error and completely contrary to the existing case law in this area (See, for example, *Tampe Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961)).

Other important questions of law and fact are raised by the findings and conclusions of the Hearing Examiner under Count II of the complaint by virtue of the fact that such findings and conclusions are not supported by the substantial evidence in the record as set forth more particularly in the questions presented for review above.

[fol. 51] Wherefore, for the reasons stated above, petitioner requests that its petition for review be granted by this honorable Commission.

Respectfully submitted, Gaylord C. Burke, Edwin S. Taylor, Counsel for Respondent, Brown Shoe Company, Inc.

Bryan, Cave, McPheeters & McRoberts, Of Counsel.

February 17, 1962.

BEFORE FEDERAL TRADE COMMISSION

ORDER GRANTING PETITION FOR REVIEW—March 15, 1962

Respondent having filed on February 19, 1962, a petition for review of the initial decision of the hearing examiner in this proceeding pursuant to §4.20 of the Commission's Rules of Practice, and counsel supporting the complaint having filed an answer in opposition thereto; and

The Commission having determined that said petition should be granted:

It Is Ordered that respondent's petition for review of the hearing examiner's initial decision be, and it hereby is, granted.

By the Commission.

Joseph W. Shea, Secretary.

Issued: March 15, 1962.

BEFORE FEDERAL TRADE COMMISSION

Final Order—February 20, 1963

This matter having come on to be heard upon respondent's exceptions to the initial decision of the hearing examiner [fol. 52] aminer and upon briefs and oral argument in support of said exceptions and in opposition thereto, and counsel for both parties having filed on September 4, 1962, a "Joint Motion for Correction of Record"; and

The Commission having rendered its decision denying the exceptions of respondent and having determined that the aforesaid "Joint Motion for Correction of Record" should be granted:

It Is Ordered that the hearing examiner's initial decision be modified by striking therefrom paragraphs 41 and 42 of the findings and substitute therefor the findings embodied in the accompanying opinion beginning on page 21 *with the words "In short, from our review of the record," and ending on page 27 *with the words "interfering with

* Record pages 73 and 79 respectively.

the latter's independent judgment in making purchasing decisions."

It Is Further Ordered that the hearing examiner's initial decision, as modified and supplemented by the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that the "Joint Motion for Correction of Record" filed September 4, 1962, be, and it hereby is, granted.

It Is Further Ordered that respondent, Brown Shoe Company, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission, Commissioners Anderson and Higginbotham not participating.

(Seal.) Joseph W. Shea, Secretary.

Issued: February 20, 1963.

Before Federal Trade Commission

Docket No. 7606.

In the Matter of Brown Shoe Company, a Corporation.

Commissioners:

Paul Rand Dixon, Chairman,
Sigurd Anderson,
Philip Elman,
Everette MacIntyre,
A. Leon Higginbotham, Jr.

Opinion of the Commission—**Filed February 20, 1963**

By Dixon, Commissioner:

I

Complaint, Initial Decision, and Respondent's Exceptions

This matter is before us on the exceptions of respondent, Brown Shoe Company, Inc. (Brown), to the initial decision and order of the hearing examiner holding that respondent violated Section 5 of the Federal Trade Commission Act by virtue of its franchise agreements with independent shoe retailers as well as by its activities in connection with resale price maintenance.

Specifically, Count I of the complaint charges that respondent, through its Brown Franchise Stores Division, has been and is now engaged in unfair acts and practices by entering into contracts or franchises with a substantial number of independent shoe retailers, requiring such customers to restrict their purchases of shoes for resale to respondent's lines and precluding such retailers from purchasing the products of Brown's competitors. The complaint alleges further in this connection that franchisees under the plan receive valuable benefits and services and that in consideration therefor they were required to con- [fol. 54] centrate their purchases on the grades and price lines of shoes sold by Brown and to refrain from selling the shoes of competitors. The complaint charges that dealers who violate the agreement to concentrate on respondent's shoes and to refrain from handling lines conflicting with

those of respondent are dropped from the Brown franchise plan and deprived of its attendant benefits. The complaint states that the purpose, intent or effect of respondent's franchise plan may be substantially to lessen and restrain competition in the purchase and sale of shoes in interstate commerce, to foreclose a substantial share of the retail dealer market in many trade areas to Brown's competitors, as well as to further enhance the dominant position of Brown in the industry and tend to create a monopoly in Brown in the purchase and sale of shoes in interstate commerce.

Count II of the complaint charges that respondent's requirement or its attempt to require that its retailer customers adhere to arbitrary and noncompetitive prices promulgated by Brown is an unfair method of competition.

The hearing examiner, in the initial decision, found that counsel supporting the complaint had sustained the burden of proof under both counts of the complaint and ordered respondent to cease and desist from entering into or continuing agreements or understandings with the purpose or effect of precluding its customers from independently deciding whether shoes should be purchased from Brown's competitors, as well as the volume of such purchases. The order entered by the initial decision further prohibits respondent from obtaining or attempting to obtain agreements, understandings or assurances from its customers on the resale price of its shoes.

Although respondent takes numerous exceptions to the examiner's findings, the thrust of its argument on appeal may be briefly summarized. With respect to the allegations under Count I of the complaint, respondent contends there is no substantial evidence to support the finding that the restrictive provision in the franchise agreement requiring concentration on Brown's products and prohibiting purchase of lines conflicting with respondent's had been en- [fol. 55] forced or that the restrictive provision necessarily inhibited stores under the franchise plan from buying other brands which they would have purchased if not so restricted. Respondent further denies that the record justifies the inference that the restrictive provision in the written franchise agreement had been agreed to by the ma-

jority of franchise dealers who had not signed such an instrument. Respondent takes the position that the hearing examiner, in making the finding that the restrictive provision in issue here was enforced, erred in relying on the memoranda of Brown's employees and officials, when the inferences which could be drawn from these documents were rebutted by the testimony of respondent's witnesses. Respondent argues that accordingly such inferences were contrary to the weight of the evidence. Respondent contends further that its Brown franchise plan is lawful and that the services furnished under the program give Brown no leverage whereunder the franchisees can be forced to buy Brown brand shoes. Respondent further maintains that membership in the franchise program does not affect a retailer's ability to purchase the respondent's shoes under the same terms and conditions as all customers.

Respondent argues that there has been no showing that its competitors are foreclosed from selling to franchise stores or that the adverse effect of the franchise plan on competition has been substantial. In this connection the respondent also claims that the examiner erred in delineating the relevant geographic market as the trading areas where a Brown franchise plan account is located. Brown states that the proper geographic market is the nation as a whole, since this is the area of effective competition between Brown and other shoe manufacturers. Respondent, in effect, claims that had the examiner correctly defined the relevant market he would have been forced to find that Brown's sales to its franchise stores were not substantial.

In the case of the charges under Count II of the complaint, respondent argues that there is no substantial evidence to support the finding that it required or attempted to require its customers to maintain the resale prices which it established. Respondent argues that the record shows only that Brown encouraged its customers to obtain an [fol. 56] adequate markup to cover their expenses. As in the case of its exceptions to the examiner's findings under Count I, respondent urges that the hearing examiner erroneously relied on inferences drawn from documentary evidence which the testimony of its customers, employees and officials had rebutted. In this connection respondent argues

that such inferences were therefore necessarily contrary to the weight of the evidence.

Brown also objects to the order entered below on the ground that it is vague and indefinite, excessively broad, and not in conformity with the complaint or the evidence in the record.

II

The Operation of the Brown Franchise Program.

The threshold question presented by respondent's exceptions to the examiner's findings under Count I is whether he correctly found that the restrictive provision against the handling of conflicting lines had been, and will continue to be, enforced, and that it necessarily inhibits franchise holders from buying other brands which they would buy if not so restricted.[1]

Respondent argues, in effect, that the restrictive provision is not enforced insofar as the signers of written franchise agreements are concerned and is not even a part of the agreement or understanding between respondent and those franchise holders who did not sign such an instrument. Upon a review of the evidence we are persuaded the finding in question is clearly supported by substantial evidence.

The franchise agreement states:

> "In return I will:
>
> Concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company."

[fol. 57] The proviso on its face restricts franchisees as to the purchases they may make from competitors of Brown. Further, the manager of the Brown Franchise Stores Division, in the course of his testimony in this proceeding, expressly admitted that the restrictive provision was equally applicable to signer and nonsigner franchise

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[1] Initial Decision, Paragraph 38.

holders alike.[2] It is therefore difficult to understand respondent's bald assertion that there is no evidence demonstrating that the restrictive proviso was part of the agreement and understanding between respondent and those franchisees not signing the agreement.

The documentary evidence in the record on which the hearing examiner relied, namely, the instructions to field men from the manager and assistant manager of the franchise program as well as the field men's reports to their superiors, clearly support the finding that respondent's field men were expected to, and did their utmost to, encourage concentration on Brown lines and elimination of conflicting lines.[3] The following declarations by Brown field men or their superiors support the hearing examiner's finding on this point:

> ". . . He has been urging us to allow him to carry 'Town and Country' which are profitable for him in Willimantic and has been refused. I am leaving Risque in as a cushion for this problem. Time will have to settle that problem." (Brown Franchise Division Inter-Company Correspondence—McEmery to Lon

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[2] "Q. With respect to paragraph 1 of Exhibit 25-C [the restrictive provision] and its interpretation, do you make any distinction between the Brown franchisees who have signed one of these contracts and those who have not signed a contract?

"A. No, sir.

"Q. Would that be true of the provisions of the Brown franchise program as a whole? In other words, the services that a man can get and the requirements and obligations that he is supposed to live up to.

"A. Yes, that is correct. There would be no variation of service or items whether he signed the agreement or not."

If this statement is not to be taken as an express admission that the terms of the restrictive proviso are applied to both signers and non-signers of the agreement alike, then the utility of the English language as a suitable means of communication is indeed subject to question.

[3] Initial Decision, Paragraphs 26 and 28.

Carrol, dated February 4, 1957, re Prague Shoe Company, New London, Conn.)

[fol. 58] "Outside lines were discussed and she also agrees that most are not necessary and will be discontinued. This will eliminate many over-lapping patterns and types that she does not need in this low-volume store." (Report of field man Bob Taylor to Tom Curtis re White's Shoe Store, Lancaster, New Hampshire, July 19, 1958.)

"He has already discontinued Heydays and will drop Jolene, Williams and Show Offs for fall. He is concentrating more on our lines each season." (Report of field man T. R. Forgan to Franchise Division, dated April 26, 1958, re Ward's Bootery, Chanute, Kansas.)

"I think it is time for a forthright discussion with Mr. Bump on what we attempt to accomplish with dealers who operate their business on our Franchise Program. If he does not see the wisdom of going along with the thought of operating these stores more progressively, avoid directly conflicting purchases, then I think we have no other alternative than to ask him to withdraw from the program." (Letter to field man T. R. Forgan from Dick Johnston, Manager of the Brown Franchise Stores Division, dated February 18, 1958, re Lloyd's Shoes, Wichita and Great Bend, Kansas.)

"The one very important point that concerns me, T. R., is that you say he can get a better mark up on men's Great Northern shoes and that his customers want leather soles. If this be the case and he is determined to continue to carry Great Northern instead of Pedwin, then we have no other alternative than to ask him to withdraw from the Franchise Program." (Letter to Brown field man T. R. Forgan, from Dick Johnston, March 11, 1958, re Bump Shoe Stores, Wichita and Great Bend, Kansas.)

These statements and others in a similar vein are contained in memoranda pertaining to retailers who had signed the agreement as well as to nonsigners. They clearly demonstrate that Brown field men, pursuant to the instructions of their superiors, followed a policy of discouraging the pur-

chases of competitors' lines conflicting with Brown and [fol. 59] urging the elimination of conflicting lines. These actions were obviously pursuant to the restrictive policy expressed in the written franchise agreement applicable to signers and nonsigners alike.

Another persuasive fact compelling the same conclusion is the legend "Encourage concentration on B. S. C. lines and elimination of conflicting lines" borne for some time on the field men's reports. This slogan also supports the inference that the basic purpose of the program as far as Brown is concerned is to serve as a medium to persuade a selected group of stores, namely, its franchise dealers, to restrict their purchases of shoe lines conflicting with those of respondent.

Brown's argument that the restrictive provision is not enforced or a part of respondent's arrangement with all of the franchise stores, namely, the nonsigners, is not reconcilable with the admission in respondent's brief, obviously applicable to the franchise program as a whole, that:

> "The record shows that Brown franchise dealers are offered and given the benefits and services of the kind and character in evidence, in return for concentrating on Brown's lines, and carrying them in a representative manner. If and when a dealer decides to cease concentrating on Brown lines and to purchase the major portion of his requirements elsewhere, he may be asked to leave the franchise program (CX 28, 29). This is Brown's relationship to its Brown franchise dealers, both with and without written agreements." [4]

Even in the light of this rather euphemistic statement, the assertion that the restrictive provision was not a part of the understanding between respondent and all its franchise holders strains credulity. A more realistic appraisal of the actual situation as disclosed by the record is, of course, that the program requires respondent's franchisees to purchase the majority of their shoes from Brown and consequently they are sharply restricted in the purchases they may make from Brown's competitors.

[fol. 60] The true nature of the relationship between

[4] Respondent's Brief, page 19.

Brown and its franchisees, however, is explicitly set forth in the answer by respondent to interrogatories in *United States* v. *Brown Shoe Company et al.*[5] There respondent expressly stated that the handling of conflicting lines is one of the factors considered as a failure generally to comply with the conditions of the franchise program. In this connection, Brown's reply further stated: "This [conflicting lines] covers the situation where the franchise account sold shoes of another company which directly conflicted with a line or lines of shoes manufactured by Brown Shoe Company. This was completely contrary to the franchise agreement."[6]

Aarol C. Fleener, vice-president of respondent, testified in *United States* v. *Brown Shoe Company et al.*,[7] that:

> "Q. Do you ever drop a dealer because he carries conflicting lines?
>
> "A. We will drop them from the franchise plan, yes, if they persist in carrying conflicting lines."[8]

Moreover, the record demonstrates specific instances where retailers have been separated from the franchise program in the course of enforcing the restrictive terms of the agreement pursuant to the policy enunciated by Mr. Fleener. For example, Samuels Shoe Store, Compton, California, Richards Shoes, Norwalk, California, Seymours Shoes, Evansville, Indiana, and Revell and McCall Store, Emporia, Kansas, among others, were all separated from the program at various times in the period November 1954 to April 1958 for carrying shoes conflicting with those of respondent's.

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[5] 179 F. Supp. 721 (E. D. Mo. 1959), *aff'd* 370 U. S. 294 (1962).

[6] This material is incorporated into the record as CX 28. It may be noted that respondent's definition of its policy on its franchiseholders' purchases from competitors (note 4, supra), which is based in part on this exhibit clearly glosses over the admission that purchases of conflicting lines are completely contrary to the franchise agreement.

[7] Supra, note 5.

[8] Included in this record as CX 118.

The memoranda of respondent's personnel demonstrating Brown's efforts to eliminate or restrict the franchise [fol. 61] holders' purchases of conflicting lines, coupled with the language of the restrictive proviso in the written agreement, as well as the actual enforcement of that provision, shown by the separation of noncomplying retailers, evidence respondent's intent to restrict the access of other shoe manufacturers to retailers under the franchise plan. It is inconceivable that respondent, which obviously invested considerable time and effort and expense in the program, would permit a retailer to enter or enjoy the benefits of the plan unless he assented to what was clearly Brown's purpose in establishing the program. Our conclusion on this point is confirmed by the following testimony of Mr. Fleener also given during the course of the trial in *United States* v. *Brown Shoe Company et al.*:

> "Q. During the past five or six years, have any franchises been discontinued because the franchisee didn't concentrate on Brown branded merchandise?
>
> "A. Yes, I would say there have been some.
>
> "Q. Before you dropped the franchisee, did you warn him that you're going to drop him?
>
> "A. Naturally, in dealing with our customers, we try to get them to follow the program and if we find they persist in not doing it, why, then there's no point in continuing this plan.
>
> "Q. You point out the various benefits of the plan and try to get them to concentrate on your lines?
>
> "A. Yes, we do.
>
> "Q. Do you feel that there's no point in continuing the plan if the firm won't concentrate on your lines?
>
> "A. As a franchise man, yes. We'll still sell them shoes, branded shoes." [9]

In the light of these considerations, we must concur with the hearing examiner's reliance on the documentary evidence in preference to the testimony of respondent's dealer witnesses. Respondent's accusation, that in not taking the testimony of its dealer witnesses at face value the hearing examiner arbitrarily and unjustly ignored the only substantial evidence in the record, is without merit. Documen-

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[9] Id.

tary evidence subsequently contradicted or explained by [fol. 62] participants to the events related therein or qualified by the authors or other witnesses is, of course, not by virtue of that fact inherently insubstantial or necessarily outweighed by such testimony.[10]

The fact is that the hearing examiner, in making the disputed findings, performed precisely the function for which he was appointed, that is, to evaluate and weigh the probative worth of conflicting evidence; this is a task which he is uniquely equipped to perform since he observed the demeanor and bearing of the witnesses during the course of their testimony. Respondent, in effect, would strip both the examiner and the Commission of the fact-finding function imposed upon them by statute. It is, of course, well settled that, even in those instances where substantial evidence supports inconsistent inferences, an administrative agency is not precluded from drawing one of them.[11]

We now turn to respondent's related procedural argument that the examiner erred in refusing permission to adduce additional testimony from franchise dealers on their understanding of and experiences with the Brown franchise program. Respondent contends that this testimony should not have been curtailed until the examiner could make a finding that the remaining Brown franchise dealers, if called to testify, would testify along the same or similar lines as the thirty-six dealer witnesses whom respondent had already called to the stand.

Section 4.14 (b) of the Commissioner's Rules of Practice, which respondent cites in this connection, although providing that every party shall have the right to present evidence,[12] does not confer a license to present cumulative or unduly repetitive evidence.

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[10] Cf. *United States* v. *United States Gypsum Co. et al.*, 333 U. S. 364, 396 (1948).

[11] *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106 (1942); *Carter Products, Inc.* v. *Federal Trade Commission*, 268 F. 2d 461, 491 (9th Cir. 1959), *cert. denied* 361 U. S. 884 (1959).

[12] "Every party . . . shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing."

[fol. 63] In making the disputed ruling, the hearing examiner stated:

> "... I am not going to permit you to call any further dealer witnesses to testify in the same manner as the past dealers have testified."
>
> * * * * * * *
>
> "... It seems to me that I have heard all of that kind of testimony that I need to hear. In fact, a lot of the testimony that we have heard has been cumulative. I certainly don't want to listen to any more of the same kind of testimony...."

It is obvious from the ruling complained of that the hearing examiner took into consideration the probability that respondent could well call a great many more retailers who would testify along lines substantially similar to the testimony of previous dealer witnesses, but that this particular line of testimony would not gain in probative worth as far as he was concerned by virtue of repetition. An examination of the testimony of respondent's thirty-six dealer witnesses convinces us that the examiner had ample opportunity to properly evaluate this evidence and that he rightly concluded that pyramiding additional testimony of this nature would not aid him in resolving the issues presented.

The examiner who has heard the witnesses must have the discretion to prohibit cumulative testimony on those points where he is satisfied that the issues have been thoroughly presented and that additional evidence of a cumulative nature would not assist him in arriving at the truth. Moreover, "... It has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment or whim. . . ."[18] The principle that the extent to which cumulative evidence will be received rests within the sound discretion of the trial court is well

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[18] VI. Wigmore, "*A Treatise on the Anglo-American System of Evidence in Trials at Common Law*", Section 1907, 3rd Edition, 1940.

established.[14] Were it otherwise, neither the Commis-
[fol. 64] sion nor the hearing examiner would be able to dispatch the business before them.

Respondent further argues that the examiner wrongly construed the documentary evidence as proof of enforcement of the restrictive provision when in fact many of the statements therein reflected only the concern of Brown's manager or field man for inventory situations wherein a retailer had too many overlapping patterns or styles or was carrying too many lines of shoes. Respondent argues that the principle of lien concentration, viz., concentrating on one brand line of shoes in a given price range and thus avoiding conflicting lines, which increase inventory and duplicate patterns without bringing in additional sales, is a principle of good shoe retailing.

An examination of the field men's reports and the memoranda of their superiors convinces us that while respondent's employees may well have been concerned about the inventory situation of certain franchise stores, their altruism in this respect was not unalloyed and that the overriding concern was the elimination of competitor's conflicting lines and concomitantly promoting an increase in the volume of purchases from Brown.

We need not concern ourselves here with the arguments of respondent and counsel supporting the complaint about the intrinsic economic merits of line concentration against the advantages of selecting only the best items from several lines in the same price and style ranges. We suspect that the validity of the principle may vary with the individual situation of the particular retailer.

The economic justification, if any, of line concentration is irrelevant to the issues presented to us here. While line concentration itself may or may not be economically justifiable, there is no economic justification for making the adherence to this doctrine the subject of agreement between buyer and seller and enforcing the agreement to the latter's advantage.

We are here concerned with the question of whether the

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[14] See *Suhay et al.* v. *United States*, 95 F. 2d 890, 894 (10th Cir. 1938), *cert. denied* 304 U. S. 580 (1938); *Hauge* v. *United States*, 276 Fed. 111, 113 (9th Cir. 1921).

franchise plan operates to foreclose Brown's competitors from a segment of the market. If the operation of the fran- [fol. 65] chise plan is, in fact, an illegal restraint of trade, its reasonableness may not be justified on economic or other grounds.[15] The short run advantage, if any, to respondent's franchise dealers of systematic application of the principle at the urging of respondent because of their membership in the franchise program cannot outweigh the long range interest of the community in the removal of restraints on competition.[16]

Respondent, by incorporating its insistence on line concentration (on Brown products) as a basic tenet of its franchise program, has achieved a measure of control over the purchasing operations of the dealers under that program. Respondent's basic mechanism for achieving such control and influencing the purchasing decisions of its franchise stores are the detailed reports on inventory, purchases, etc., to be submitted to respondent's franchise division or field men for their information, analysis, and suggestions, as well as the conferences between the retailers and field men on the inventory situation and future purchases.

The record demonstrates that the retailer's prime motivation for joining and staying in the franchise program was the benefits and services available to him as a franchise dealer. These benefits have been fully described in the initial decision and that task need not be duplicated here.[17] Not every dealer utilized all of the benefits or services available, but it is apparent that the services collectively achieved the effect desired by Brown, namely, attracting

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[15] See *Sandura Company,* Docket 7042 (1962).

[16] See *Standard Oil Co. of California et al.* v. *United States,* 337 U. S. 293, 309 (1949).

[17] "Among the benefits and services which a dealer will receive by being on the franchise plan are: architectural plans, service of a field representative, merchandising records, retail sales training program, accounting system, national and regional meetings, and group purchasing of insurance, rubber footwear, and display material." (Initial Decision, Paragraph 13.) See also paragraphs 14-21 of the examiner's findings.

retailers to the program and inducing them to comply with its requirements.

Respondent apparently contends that the franchise program is inherently lawful and in support of that contention [fol. 66] cites *Federal Trade Commission* v. *Sinclair Refining Company*,[18] and *The Timken Roller Bearing Company* v. *Federal Trade Commission*.[19] In our view, however, neither precedent supports the position of respondent. Both the *Timken* and *Sinclair* cases turned on factors not applicable to the instant proceeding. While it is true that in *Sinclair* the gasoline dealer could purchase respondent's products with or without the equipment subject to the restrictive lease and that in the instant case a retailer may purchase Brown's products irrespective of his membership in the franchise plan, the restrictions attendant on the franchise program are considerably more far-reaching than the arrangements upheld in *Sinclair*. In *Sinclair*, the agreement only purported to limit the gasoline which could be dispensed through the pumps leased by respondent, the dealer being free to secure additional equipment through which he might dispense whatever gasoline he desired. On these facts, the Court held that Sinclair's leases did not undertake to limit the lessee's right to use or deal in the goods of a competitor of Sinclair.

In this case, Brown's franchise dealers are expressly prohibited from purchasing lines of shoes conflicting with those of respondent and are required to concentrate on respondent's products; the prohibition extending to the franchisee's entire business as long as he is under the program. Under the terms of the restrictive provision under consideration here, the dealer, unlike the gasoline dealer in *Sinclair*, is forecloseed from exercising his own judgment as to the purchases he may make from his suppliers' competitors.[20] In Sinclair, the Court further found that limiting

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[18] 261 U. S. 463 (1923).

[19] 299 F. 2d 839 (6th Cir. 1962), *cert. denied* 371 U. S. 861 (1962).

[20] The Supreme Court in subsequently analyzing the import of *Sinclair* held:

> ". . . there is marked difference between a contract which confines an entire retail outlet to the sale of a

single brand and a contract which merely confines the use of a dispensing mechanism to a single brand. . . ." *Standard Oil Co. of California et al.* v. *United States*, supra, note 16, at p. 304, n. 6.

the leased equipment to the sale of Sinclair fuel protected the integrity of the Sinclair brand from possible debase- [fol. 67] ment through the sale of inferior fuels. The franchise program cannot be justified on such grounds. The analogy advanced by respondent is neither relevant nor appropriate and does not support the conclusion that somehow the Brown franchise program is inherently lawful.

Respondent cites the *Timken* case[21] in support of the assertion that "its program of giving benefits and services to shoe retailer customers who concentrate on Brown brand lines is entirely lawful." Specifically, respondent relies upon the holding by the court that a manufacturer is not prohibited from selecting dealers who will devote their energies to his products nor compelled to retain dealers with divided loyalties and that the seller has the right to select his own customers. The rule in *Timken*, on which respondent relies, predicated on the finding that no agreement between respondent and its dealers had been shown is not applicable to the circumstances of this record. In the instant case, as heretofore noted, the evidence demonstrates agreements and understandings between Brown and its franchise holders expressly prohibiting the latter from purchasing lines conflicting with those of respondent.

The examiner's holding that the franchise plan was a major factor in foreclosing markets to competitors of respondent is supported by the record. In disputing this finding, respondent directs our attention to fragments of the testimony of representatives of its competitors and to the statements of its retailer witnesses in order to rebut the inferences which must be drawn from the operation of the plan as a whole. We have already noted that the terms of the restrictive proviso prohibiting the purchase of conflicting lines and demanding concentration on Brown products was part of the understanding between respondent and the retailers of the franchise plan, which by October 1961,

[21] Supra, note 19.

numbered 766 stores, whether they had signed a written agreement or not. We have also noted the activity of respondent's officials and employees in enforcing this under-[fol. 68] standing. The record is indisputable that franchisees have been expelled from the program for handling lines conflicting with those of respondent. In short, the record demonstrates that the restrictive proviso under consideration here has been enforced. The fact that the restrictive understanding between Brown and its franchisees has been effectively enforced is documented by the testimony of Aarol C. Fleener, Brown's vice-president, in *United States* v. *Brown Shoe Company, et al.*,[22] that on an over-all basis Brown franchise dealers' sales of shoes purchased from respondent would constitute 75% of their total sales. This percentage, according to the witness, in the case of individual stores may vary from 60 to a high of 95%. Moreover, the extent to which competitors' conflicting lines are excluded from the franchise dealers' shelves is undoubtedly higher than these figures indicate, for this witness also stated that purchases from respondent's competitors in individual instances would be dictated by a need for either higher or lower price shoes than those made by respondent.

The foregoing summary of the facts establishing that conflicting lines of competitors are excluded by virtue of the enforcement of the terms of the restrictive proviso in the franchise agreement, and that such enforcement of the proviso was substantially effective, is sufficient to support the examiner's finding that respondent's competitors are foreclosed from selling to the market represented by the franchise dealers. Respondent's further contention that its competitors are not foreclosed because franchise holders are free to leave the plan without restriction is without merit; this proceeding, of course, is concerned with the foreclosure arising with respect to those retailers under the plan. While the record does indicate some attrition in the membership of the plan, we are satisfied that, on the whole, the relationship between Brown and its franchisees is a reasonably stable one.

The examiner, in making this finding, also properly re-

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[22] Supra, note 5 (This testimony is incorporated in the record as CX 118.)

lied on the testimony of six representatives of respondent's [fol. 69] competitors who corroborated the necessary inference from the very nature of the Brown franchise program and its operation that the inevitable occurred, namely, that for practical purposes they were foreclosed from selling to the Brown franchise holders. Respondent attacks the testimony of these six representatives as hearsay and speculation on the part of obviously biased witensses. The question of bias on the part of these witnesses is, of course, best resolved by the examiner who heard them and observed their demeanor. The record does not suggest that he abused his discretion in this respect. Further, the fact that the witnesses' knowledge as to loss of sales or difficulty of making sales to retailers under respondent's franchise plan was largely derived from reports of their salesmen does not rob the evidence of probative value.[23] Obviously, this is the type of knowledge upon which businessmen must rely if they are to conduct their business. In fact, the record shows that Brown's competitors utilized this knowledge in formulating sales policy, namely, the determination on the part of some not to actively solicit Brown franchise stores because they were convinced this constituted a waste of sales effort. Since it is apparent that the witnesses themselves relied on this knowledge in their conduct of the business, it is sufficiently trustworthy for consideration by the examiner and the Commission in resolving the issues presented.

The record, moreover, demonstrates specific losses of sales by other shoe manufacturers traceable to the operation of the franchise plan, as shown by the following examples documented by sales data from Brown's competitors:

[23] Certain of the witnesses who experienced personal rebuffs from franchise dealers were, of course, also testifying from first hand knowledge.

[fol. 70]

Franchise Shoe Store	Date It Joined Plan	Name of Competitor	Competitors' Sales to Franchise Store	Total Pairs of Shoes
Fisher Shoe Store, Plymouth, Mich.[34]	12/17/52	Juvenile Shoe Co.	1951	1,224
			1952	1,530
			1953	246
			1954	240
			1955	252
			1956	381
			1957	228
			1958	188
			1959	314[35]

Franchise Store	Date It Joined Plan	Name of Competitor	Competitors' Sales to Franchise Store	Dollar Volume
Blynn's Shoe Stores, Inc., Pittsburgh, Pa.	2/27/59	Weyenberg Shoe Co.	1957[36]	636
			1958	2,782
			1959	376
			1960	......
Gryder Co., Biloxi, Miss.	5/11/55	Weyenberg Shoe Co.	1951	1,581
			1952	5,803
			1953	8,388
			1954	3,219
			1955	428
			1956	186
Meyers Shoe Store, Watertown, Wisc.	8/ 2/56	Leverenz Shoe Company	1953	397.30
			1954	1316.10
			1955	2399.12
			1956	886.25
			1957	......

[34] The Vice-President of the Juvenile Shoe Co. testified that the owner of this store advised him that purchases would be curtailed because of Fisher's participation in the franchise program.

[35] Commencing with 1953, the majority of sales were of the "short" Clinic line. E. g. Out of 246 pairs sold in 1953, 234 were Clinic.

[36] New account November 1957.

The fact that some representatives of Brown's competitors erred in their testimony relating to certain accounts to whom they allegedly lost sales because of the operation of the franchise plan, or that certain of Brown's dealers may have withheld purchases from Brown's competitors for reasons other than the existence of the franchise agreement, does not significantly detract from the force of this evidence. The record, as we have noted, does show concrete examples of such losses, but more significant is the testimony of these witnesses on the over-all impact of respondent's program and similar programs of other manufacturers on their sales opportunities generally.

Respondent, conceding that its franchisees concentrated on its lines, directs our attention to the testimony of

[fol. 71] certain dealers to the effect that their choice to enter the franchise program was governed by the quality and performance of respondent's product, and contends further, in effect, that the decision to concentrate was, therefore, a voluntary choice, quiet unlike the situation where the manufacturer prohibits the purchase of competitor's goods. We are not persuaded. Respondent glosses over the fact that whatever a dealer's reasons may have been for entering the program, once he became a participant he was subject to the agreement or understanding requiring him to refrain from purchasing a competitor's conflicting lines and to concentrate on respondent's products. The record is plain that whatever the merit of its products, respondent added to its competitive arsenal the franchise plan embodying restrictions, which necessarily foreclosed competitors from effectively selling to the select group of retailers under that program.

Respondent also directs our attention to its "Outside Line Survey" as conclusive proof of the fact that Brown's competitors are not foreclosed from selling tc retailers on the franchise plan. The survey, according to respondent, demonstrates that approximately five out of six franchise stores carried at least one conflicting line, while many carried two or more. The hearing eaxminer's analysis of this evidence agrees with respondent's contention to the extent of finding that five out of six of respondent's franchisees did carry at least one line competing to some extent with a Brown line. However, the examiner's other findings pertinent to the survey data puts this evidence in its proper context and precludes the inference which respondent urges on us on the basis of the "Outside Line Survey". The following findings of the examiner are crucial on this point:

> "Respondent also contends that most franchise holders carry other lines, some of which are conflicting, and that this shows a lack of effectiveness of any restrictions if any there be. Most of the important conflicting lines carried by the franchise holders are short lines of specialty shoes, such as Clinics (primarily for nurses) and Hush Puppies (loafers), which are condoned, . . ." (Initial Decision, Paragraph 40).

[fol. 72] and

> "... Over the years most of these dealers have learned that respondent will condone some duplication of lines, particularly if the outside line is a short line or a specialty line or if the real volume is in respondent's lines, because five out of six of them carry at least one line that competes to some extent with a Brown line. There is a point beyond which outside lines will not be tolerated by Brown, and it is believed that generally the dealers know what it is" (Initial Decision, Paragraph 35).

Significantly, respondent, although taking exception to other findings in paragraphs 35 and 40 of the initial decision, has not taken exception to the excerpts quoted above. We may take these findings as undisputed, therefore. Our own review of the evidence, moreover, persuades us that the findings of the examiner are amply supported by the record. For example, J. R. Johnston, the manager of Brown's franchise program, under whose direction and supervision the survey was made, testified that a franchisee might simply be carrying a few patterns of a conflicting line and yet be listed by the survey as carrying a conflicting line. This witness further stated that even in those instances where only certain patterns in a competitor's line conflicted with respondent's shoes, if the reporting retailer carried any pattern in the line, he would be recorded as carrying a conflicting line. This witness conceded that the overlap in the Brown line and the competitor's line might extend only over a small part of either line, that is, the higher price shoes of one and the lower price shoes of the other, and yet still be considered as conflicting lines for the purposes of the survey. Of particular significance in evaluating the probative worth of this data is the further fact that the survey does not disclose the volume either in pairs or dollars of purchases of conflicting lines by the reporting franchisees; yet the record shows that the sales of competitors, whose representatives testified in this proceeding, to certain franchisees were minimal.

In the light of the examiner's findings, therefore, the "Outside Line Survey" does not demonstrate, conclusively or otherwise, that Brown's competitors were not fore-

[fol. 73] closed, as a practical matter, from selling to retailers under the Brown franchise plan; nor does it rebut the other evidence of record clearly indicating that respondent has effectively restricted access to the market represented by its franchisees to vendors of conflicting lines.

In short, from our review of the record, we find that respondent's operation of the franchise plan, which has effectively foreclosed its competitors from selling to a significant number of retail shoe stores, constitutes an unfair trade practice under Section 5 of the Federal Trade Commission Act. Respondent's practice of conditioning the benefits of membership in the plan to adherence to the restrictive terms of the franchise agreement for the purpose of foreclosing other manufacturers from selling to its franchisees is akin to the operation of tying clauses generally held as inherently anticompetitive.

Brown, on the other hand, contends that the legality or illegality of its franchise plan may be determined only after an examination of the competitive impact of the plan throughout the nation. Brown further argues that the franchise plan involves only an insubstantial share of the national market either in terms of shoes sold or number of retail outlets involved. In this connection, respondent points out that the shoes which it sells to its franchise holders constitute less than one per cent of shoe sales nationally and further argues that the same conclusion must be reached after comparison of the 766 stores under the Brown franchise plan in October of 1961 against either the 100,000 retail outlets in the country which sold shoes in 1958 or the 70,000 stores within that total classified as retail shoe outlets. Respondent concedes that the total number of outlets selling shoes included cobbler shops, drug stores, and other outlets having a limited selection of shoes or which carried few shoes in relation to their total inventory. The proper comparison, under respondent's argument, must therefore relate the number of Brown franchise accounts to the 70,000 retailers classified as retail shoe outlets. The stores under the franchise plan constitute approximately one per cent of that figure.

In making the argument that the amount of commerce involved in the franchise plan is not substantial in the [fol. 74] context of the nation as a whole, Brown relies heav-

ily on *Tampa Electric Co.* v. *Nashville Coal Co. et al.,*[27] and *Rural Gas Service, Inc.*[28] In effect, respondent urges us to apply, in a proceeding under Section 5 of the Federal Trade Commission Act, the test of illegality applicable to Section 3 of the Clayton Act to practices not coming within the narrow restraint encompassed by that statute. The Commission recently rejected a similar argument in *Luria Brothers and Company, Inc., et al.*[29] Moreover, neither case supports the quantitative insubstantiality rule Brown urges us to follow. Certainly, it would not be appropriate to promulgate a higher standard of illegality for proceedings under Section 5 of the Federal Trade Commission Act than for actions under the Clayton Act, at the urging of respondent, when the former Act was designed ". . . to stop in their incipiency acts and practices which, when full blown, would violate [the Clayton Act] . . ."[30]

If respondent's argument were material to the issue presented by Count I of this complaint, it should be weighed in the light of the holding of the Supreme Court in *Brown Shoe Co., Inc.* v. *United States.*[31] There the Court, in considering the vertical aspects of an acquisition, found the probability of a substantial lessening of competition despite the fact that Brown's sales to the acquired concern, G. R. Kinney Company, Inc., constituted less than one per cent of shoe sales nationally after the acquisition. Holding that the market foreclosure demonstrated was neither of *de minimis* nor monopoly proportions, the Court ruled that in such cases the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive and that it was, therefore, necessary to examine the various economic and historical factors in the relevant market to make the determination of whether the supplier-customer relationship is the type of arrangement which Congress sought to proscribe.[32] Factually there is a close parallel between this pro-

[27] 365 U. S. 320 (1961).

[28] Docket 7065 (1961).

[29] Docket 6156 (1962).

[30] *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.,* 344 U. S. 392, 394 (1953).

[31] 370 U. S. 294 (1962).

[32] Id., at p. 329.

[fol. 75] ceeding and the merger action involving Brown's acquisition of the G. R. Kinney Company.[33]

We have found that Brown's operation of the franchise plan constitutes an unfair trade practice violative of Section 5 of the Federal Trade Commission Act. We conclude, therefore, that Count I of the complaint has been sustained. Moreover, an examination of the market facts of the shoe industry, as developed in this record in the light of the *Brown Shoe* decision,[34] persuades us that the prospective competitive impact of the franchise program is such that the standards of illegality under Section 3 and Section 7 of the Clayton Act, as amended, have been met.

We recognize that a consideration of the economic context in which a challenged act or practice takes place of the nature pursued by the Supreme Court in *Brown Shoe*,[35] is primarily germane to a determination of legality or illegality under the Clayton Act. However, an important question remaining to be resolved under Count I is the nature and scope of the remedy to be applied. Economic factors affecting the shoe industry have a direct bearing and provide a significant guide in this respect. We turn now to a consideration of the market facts of the shoe industry for that purpose.

The structure of the shoe industry is significant. Although there are a large number of shoe manufacturers, a few companies occupy a commanding position. Of the approximately 1,000 shoe manufacturers in 1959, the top 70 manufacturers accounted for approximately 54 per cent of the shoe production in that year. The five largest manufacturers, it should be noted, produced 24 per cent of total

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[33] Kinney, at the time of acquisition, had about 1.2 per cent of all national retail shoe sales by dollar volume and 1.6 per cent in terms of pairs of shoes sold. Kinney, which obtained 20 per cent of its shoe requirements from its own plants, subsequent to the acquisition, purchased 7.9 per cent of its requirements from Brown, an amount obviously considerably less than one per cent of sales of all shoes sold nationally. At the time of trial, there were over 400 stores involved in Kinney's retail operation. Id., at pp. 303, 304.

[34] Supra, note 31.

[35] Id.

pairs of shoes produced in 1959 and their production further constituted 45 per cent of the product manufactured by the top 70 manufacturers. Even within the group [fol. 76] of the 70 largest manufacturers there is a considerable gap between the four or five largest and the remaining manufacturers. Brown, in 1959, held third rank in shoe production and second in dollar volume.[36] Of particular significance, in our view, is the fact that Brown's sales of $24,675,617 to the retailers under the franchise plan for the year ending October 31, 1959, alone exceeded by almost two million dollars the sales of the tenth ranking company in that year. This fact convincingly demonstrates the competitive disparity between respondent and the vast majority of shoe manufacturers.

The shoe retailers under the Brown franchise program are a select group, according to the testimony of respondent's own officials, and the representatives of Brown's competitors.[37] Only the better credit risks are permitted to

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	1959 Rank	Pairs of Shoes Produced		Dollar Volume
International Shoe Co.	1	51,529,543	International Shoe Co.	$283,260,000
Endicott Johnson Corp.	2	32,407,012	Brown Shoe Co.	276,549,164
Brown Shoe Co.	3	29,681,274	Genesco	276,422,000
Genesco	4	29,520,000	Endicott Johnson Corp.	146,099,113
Shoe Corp. of America	5	11,050,000	Shoe Corp. of America	117,100,000
Evy Footwear Co., Inc.	6	8,010,000	U. S. Shoe Corp.	50,858,933
Sudbury Footwear	10	6,200,000	Consolidated Nat'l Shoe Corp.	22,864,000
Kessler Shoe Co.	20	3,203,676	Five Star Shoe Co.	15,050,000
Vaisey-Bristol Shoe Mfg.	30	2,517,262	Mid-States Shoe Co.	10,100,000
Evangeline Shoe Co.	40	2,224,300	Williams Shoe Mfg. Co.	7,850,000
Connors-Hoffman Footwear	50	2,035,000	Laconia Shoe Co.	5,510,000
Juvenile Shoe Corp.	60	1,650,000	M. Beckerman & Sons, Inc.	4,150,000
Liberty Shoe Co.	70	1,450,000	Sham-O-Kin Shoe Corp.	2,312,000

(CX 89 A-B. These figures are exclusive of slippers and rubber, canvas, or plastic footwear).

[37] Respondent's descriptive brochure states that the franchise program is not available to everyone, but that the program is best fitted for the outstanding dealer or prospective dealer in each community. (CX-22U.)

[fol. 77] remain in the program. Retailers may be, and are, separated from the program because their financing is inadequate to support credit necessary for the volume of purchases expected of a franchise store, although they may have sufficient credit to purchase as a general account. The desirability of the Brown franchise plan accounts is further enhanced by the fact that while the average return of investment for independent shoe retailers generally was 11.8 per cent, Brown's franchise holders enjoyed an average 16 per cent return.

In the period 1959-1961, the number of stores enrolled under respondent's program showed an increase of approximately 12 per cent. The increase is significant, since it demonstrates an intent to expand the program at a time, when according to the testimony of the representatives of other shoe manufacturers, the prospective number of good independent retailer accounts available to independent manufacturers is diminishing.

The record evidences a trend in the shoe industry generally and on the part of respondent in particular to vertical integration by way of merger or other arrangements which naturally has a tendency to dry up otherwise available sales outlets to independent shoe manufacturers competing with Brown.

Respondent, as the hearing examiner noted, has several wholly owned subsidiary corporations engaged in the retailing or wholesaling of shoes. In this connection, the Wohl Shoe Company, one of respondent's subsidiaries, sells shoes at wholesale to approximately 3,200 customers located throughout the United States, and more significantly, in 1958, 208 of these customers operated on the "Wohl Plan." Wohl plan accounts, as the hearing examiner found, are independent retail outlets partially financed by Wohl and generally buying most of their women's shoes from Wohl. In addition, Wohl, in 1958, retailed shoes to some 457 leased department stores in 243 stores. The Regal Shoe Company, a wholly owned subsidiary of respondent, had a chain of 92 retail outlets in which its shoes were sold. Finally, the G. R. Kinney Company, whose acquisition by respondent was found illegal by the Supreme Court, in 1959 operated and owned a chain of 488 retail family shoe stores.

[fol. 78] The testimony of representatives of Brown's competitors supports the finding that the smaller manufacturers depend to a great extent on the purchases of independent shoe retailers. These witnesses stated, however, that at this time they are faced with a diminishing number of retail outlets available to them as a practical matter. According to their testimony, this trend is due in large part either to the purchase of such outlets by the larger manufacturers or to the fact that many independent retailers have come under the control of manufacturers by virtue of franchise plans or other arrangements.

The testimony of these witnesses on the subject of a trend to vertical integration in the shoe industry is graphically corroborated by respondent's own exhibits relating to the franchise plans of the International Shoe Company and of the General Shoe Company, the first and fourth ranking companies in terms of shoe production in 1959. As of 1961, International Shoe had some 1,400 independent retailers under its Merchants Service Plan, while some 317 shoe retailers were members of General Shoe's Friendly Franchise Store Plan. Most significantly, the evidence shows that in the period June 1959 to June 1961, the number of participants in the Merchants Service Plan had increased by approximately 16 per cent.

An examination of the terms of the programs of General Shoe and of International Shoe supports the testimony of the manufacturer witnesses in this proceeding that the franchise plans of the larger manufacturers generally had the effect of restricting their access to stores under such programs. Under these plans, retailers are required to feature the shoes of the sponsor and to handle the sponsor's shoes in a representative manner (Merchants Service Plan) or to purchase sufficient quantities of footwear to assure the presence of an adequate and representative stock of the sponsor's shoes in the franchise store at all times (Friendly Franchise Store Plan). Under both plans retailers are required to furnish detailed reports of their business to the sponsoring manufacturers.

Certain of Brown's competitors whose representatives testified in this proceeding make no serious effort to sell to stores under the franchise plan because of the feeling that it [fol. 79] would be a waste of time. This, in our view, is a

most significant indication of a deteriorating competitive situation, demonstrating as it does that respondent's competitors have lost the incentive to energetically strive for sales in an important segment of the market.

In assessing the need for Commission action, we must take account of the fact that historically one of the purposes of the antitrust laws, over and above purely economic considerations, has been to preserve ". . . an organization of industry in small units which can effectively compete with each other. . . ."[38] To foster the competitive position of the smaller manufacturers, Brown should be prohibited from entering into arrangements with its customers interfering with the latter's independent judgment in making purchasing decisions.

III

Resale Price Maintenance

Count II of the complaint alleges that Brown engaged in unfair acts and practices violative of the Federal Trade Commission Act by requiring, or attempting to require, its customers to adhere to the arbitrary noncompetitive resale prices which it established.

Brown communicates its suggested resale prices on the shoes it manufactures in various ways. In the case of certain selling divisions, the suggested resale price is also included on the wholesale price list. The wholesale price list of the women's and girls' lines do not give the suggested resale price but dealers are advised orally of the 44 to 45 per cent markup on these shoes by Brown's salesmen; the dealers, therefore, automatically know the suggested resale price on the shoes in these lines. Most of respondent's selling divisions send schedules of suggested resale prices each season to their accounts. In addition, respondent publishes the suggested resale prices for some of its shoes in advertisements inserted in magazines of national circulation. Brown, apparently to prevent conflict among its dealers, also suggests the starting and the closing dates of sales at [fol. 80] the end of each six-month selling season.

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[38] *United States* v. *Aluminum Co. of America et al.,* 148 F. 2d 416, 429 (2nd Cir. 1945); see also *Brown Shoe Co., Inc.* v. *United States,* 370 U. S. 294 (1962).

Respondent, according to its vice-president and board member, Aarol C. Fleener, will attempt to dissuade a dealer from selling below suggested resale prices if other customers complain about the practice in order to prevent the loss of business to the complaining retailer.

The finding that it is Brown's policy to require adherence by its dealers to the suggested resale prices on its products is specifically supported by evidence that Brown sought to bring the pricing practices of Fraver's Shoe Store, Chambersburg, Pa., and Pomeroy's Department Store in Harrisburg, Pa., into line with its suggested retail prices at the urging of another account, their competitor, Dutrey's Shoes, with stores located in Waynesboro and Carlisle, Pa.

Brown, although it concedes that the documentary evidence in the record relating to these events raises inferences of illegal price activity on its part, contends that such inferences were completely rebutted by the testimony of its witnesses. The primary question to be resolved on respondent's exceptions is whether the hearing examiner properly weighed the conflicting evidence when he found that the allegations under Count II of the complaint had been sustained. A detailed examination of these occurrences is therefore warranted.

The record demonstrates that Brown went to considerable lengths to secure adherence to its suggested resale prices on the part of the Fraver Shoe Store in Chambersburg, Pa., at the insistence of Fraver's competitor, Dutrey's Shoes, in neighboring Carlisle. In September of 1956, after Dutrey's notification that Fraver had cut prices on respondent's merchandise, Brown's field man, George Croker, called upon Fraver pursuant to Dutrey's complaint about Fraver's pricing. Croker testified that he advised Fraver that Dutrey felt that the former was not getting the proper markup on his shoes and suggested that Fraver meet with Dutrey so that they could discuss their pricing differences among themselves. The witness, who at one point in the proceeding denied that he had asked Fraver to enter into any agreement as to the resale price of respondent's merchandise, subsequently admitted that Fraver had [fol. 81] agreed to place his regular markup on Brown's shoes. Croker's subsequent contention that he and Fraver had not discussed specific prices is therefore irrelevant.

In advising his superior, J. R. Johnston, manager of the Franchise Division, as to the results of the conference with Mr. Fraver, Croker stated in his memorandum of September 9, 1956: "Mr. Fraver has invited Dick Dutrey to call on him so that they can have an agreement on the prices on their shoes and Mr Fraver has assured me he will maintain the prices on our shoes so there will be no confliction (sic) in the future." Johnston replied, advising Croker that he was glad the situation was straightened out once and for all and that Fraver's willingness to cooperate was appreciated.

A year later, in October of 1957, Dutrey again complained to Brown about Fraver's pricing. In response to that complaint, T. R. Curtis of the Brown Franchise Division, advised Dutrey that George Croker, Brown's field representative, had been requested to "personally, contact Fraver for the purpose of having a thorough understanding that he must discontinue this practice [price cutting]." In fact, Curtis did order Croker to make the call, instructing him to discuss with Fraver "the necessity of his selling our lines at our recommended retail prices" and Croker was further instructed to advise Fraver that if the latter underpriced Brown's merchandise in the future it would be necessary for Brown to discontinue its business relationship with Fraver. Copies of these instructions were sent to representatives of three of respondent's sales divisions in Fraver's area.

Croker, testifying in behalf of respondent, stated that he took no action on the letter from Curtis because he regarded these instructions as improper. This testimony is difficult to believe, since it is clearly inconsistent with his actions of the preceding year. At any rate, it is indisputable that Croker's superior in the Franchise Division, J. R. Johnston, did not let the matter rest but took personal action. On October 16, 1957, he advised Mr. Dutrey by telegram that Fraver had agreed to abide by the suggested resale prices on all patterns of the Brown Shoe Company which he carried. Johnston's follow-up letter to the tele- [fol. 82] gram assured Dutrey that he had talked at considerable length with Fraver "on why it was necessary that we ask him to abide by our suggested retail prices and he agreed to do just that." Johnston further advised Dutrey that Fraver would remark any patterns necessary at once

and that he was confident that there would be no recurrence of such price cutting since he knew that Fraver could be counted on to keep his word.

Respondent argues, in its brief, that Johnston's testimony in this proceeding must dispel any inferences of illegality which may be drawn from respondent's memoranda concerning Fraver's pricing policy. Respondent summarizes Johnston's testimony as follows:

> "Johnston testified that he did not ask Fraver for any commitment as to the prices he would charge for Brown brand shoes and that he did not ask Fraver to raise his prices (R. 418). He said that the terms 'agree' or 'agreement' used in his correspondence to Dutrey related only to the fact that Fraver 'agreed that the philosophy of raising (his) prices to afford him a reasonable markup on the basis of replacement cost made sense' (R. 418, 458-59). Johnston said that no threat to discontinue any line of shoes or anything like that, was made to Fraver (R. 420)".[39]

The argument is without merit since this testimony cannot be construed as simply explaining the statements in these memoranda; plainly, the statements of Johnston relied upon by respondent are in irreconcilable conflict with the documentary evidence. This conclusion is inescapable after a reading of Johnston's letter of October 16, 1957, to the personnel of respondent's sales divisions arranging for the policing of Fraver's resale prices in the following terms:

> "Dutrey's were very firm again in their request to have Mr. Fraver abide by our suggested retail prices and if this is not corrected once and for all it could mean losing Dutrey's account.
>
> "May I recommend that when you call on Mr. Fraver from time to time that you check the retail prices for [fol. 83] your particular line of shoes and make sure he is abiding by your suggested prices other than during clearance sale periods."

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[39] Respondent's Brief, p. 47.

We are equally convinced that Fraver's testimony that he had never been asked to enter into any agreements by Johnston or that he had never entered into any agreement with respondent on pricing practices is similarly entitled to little credit. His testimony in this regard, like the statements relied upon by respondent on the part of Johnston and Croker, simply cannot be reconciled with the contemporaneous records of the events described, unbiased by the publicity or possible consequences of litigation.

Dutrey, on June 15, 1956, also complained about the advertisements of Pomeroy's, a department store in Harrisburg, Pa., promoting respondent's shoes below the suggested resale prices. In response, the manager of the Roblee Division, on June 28, contacted John Mirra, his salesman in the area, instructing him to find out why Pomeroy's ran the advertisement and pointing out further that this customer had been previously definitely advised of the program on Roblee sales. Subsequently, on August 10, the Roblee sales manager again contacted Mirra with respect to Pomeroy's advertisement of June 15, advising that Roblee shoes went on sale only twice a year, namely in July and January, and that any other sale promotion on Roblee shoes was not to be advertised as such. Significantly, Roblee's sales manager stated: "I believe you know the policy of the Company and this is definitely not allowed." These instructions concluded with the admonition to straighten the matter out with Al Schwartz of Pomeroy's so that there would be no recurrence.

Subsequently, J. R. Johnston, manager of the Franchise Division, advised Dutrey that both the Roblee salesman and sales manager had authorized him to give Dutrey their assurance that there would not be a recurrence of Pomeroy's advertisement of price cuts on Roblee shoes in advance of the sale period for Roblee shoes.

By September of 1956, Pomeroy's had again advertised Brown's shoes below the suggested resale price. In this [fol. 84] instance, both the Roblee and Buster Brown brands were involved. Another complaint by Dutrey ensued. This time the irate customer complained directly to the president of Brown, Clark R. Gamble. By letter of September 12, 1956, Mr. Gamble advised Dutrey that his complaint would be given thorough attention and that he would

hear from Brown as soon as a complete investigation had been made. A copy of this letter was sent to Tom Curtis of the Brown Franchise Division. Curtis advised respondent's president that the manager of the Roblee Division was writing Mirra, the Roblee sales representative in the area, instructing the latter to contact Pomeroy's for the purpose of getting the price cutting situation straightened out and to insure there would be no repetition.

The sales manager of Roblee did, in fact, instruct his salesman to visit Pomeroy's to correct this situation to insure there would be no recurrence of such advertising in the future. Mirra was advised that if there were a repetition of this advertising Brown would be forced to withdraw the Roblee line from the Pomeroy store in Harrisburg. The salesman of the Buster Brown Division was given similar instructions by his sales manager.

Respondent, to rebut the documentary evidence, adduced testimony from the salesmen of the Roblee and Buster Brown Divisions as well as from Messrs. Schwartz and Moscowitz, division manager of shoes for Pomeroy's and assistant division manager, respectively. Schwartz and Moscowitz both testified that they had set shoe prices independently and that no one from Brown had ever complained to them about their pricing decisions. Mirra testified that he did not discuss the June 15 advertisement complained of by Dutrey with Pomeroy's and had done absolutely nothing with respect to the instructions from the sales manager ensuing from Dutrey's first complaint. With respect to Dutrey's second complaint, Mirra admitted that he asked Pomeroy's not to advertise the sales but "just sell them [the shoes], put them on the table and sell them so I could get Mr. Dutrey off my back." Tufton, the Buster Brown salesman, testified that he might have received a memorandum from the Buster Brown sales manager on [fol. 85] Dutrey's complaint on Pomeroy's pricing but had never made any calls pursuant to such a memorandum.

This testimony is simply not credible in the light of the documentary evidence. It is inconceivable that respondent's personnel did nothing or as little as one might believe, taking their testimony at face value, since J. R. Johnston, manager of the Franchise Stores Division, stated in a letter to his field man, George Croker, referring to Pome-